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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TEAMSTERS LOCAL 853, Petitioner, v. KEYSTONE AUTOMOTIVE OPERATIONS, INC., Respondent.	Case No. 32-RC-137319 **UNION'S OPPOSITION BRIEF TO RESPONDENT'S EXCEPTIONS TO HEARING OFFICERS REPORT AND RECOMMENDATIONS ON OBJECTIONS**

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I. INTRODUCTION

The Hearing Officer recommended that the Board sustain Petitioner's Objections Nos. 4, 6, 9 and 11. The Hearing Officer found that the Employer committed objectionable conduct, specifically making improper promises of better pay, threatening loss of benefits, and unlawfully interrogating employees. The Hearing Officer further found that this objectionable conduct reasonably tended to interfere with employees' free choice and recommended that the election be set aside and that a new election be conducted.

The Employer excepted to the Hearing Officer's decision on several grounds, particularly asserting that the Hearing Officers findings of fact and law were in error. The Employer's exceptions further assert that the Hearing Officer erred by finding that the Employer's objectionable conduct interfered with employees' choice justifying that the election be set aside. For the reasons to be set forth below, the Employer's exceptions should be rejected as the Hearing Officer's findings of fact and law are correct and the Hearing Officer correctly determined that the Employer's objectionable conduct satisfies the Board's test for setting aside an election.

II. ARGUMENT

A. The Board Should Adopt the Hearing Officer's Finding That the Employer Improperly Made Objectionable Promises of Wage Increases.

The Employer excepts to the Hearing Officer's findings that the Employer improperly promised wage increases to employees prior to the election. Contrary to the Employer's exceptions, the Hearing Officer's findings are correct. The Hearing Officer made appropriate credibility and factual determinations and similarly correctly applied the law. In fact, the facts in this case are very similar to cases where the Board has found that the Employer made objectionable promises of wage increases.

1. *The Hearing Officers Credibility Findings Should be Adopted.*

The Hearing officer credited the Union witnesses' testimony regarding the meetings where the Employer made its improper wage promises. The Hearing Officer made that credibility determination because the Union's witnesses had more detailed accounts of the meetings, and their accounts were consistent. The Hearing Officer on the other hand found that the Employer's witnesses were vague, lacked details, and were evasive. (HO Report at 11) The Employer excepts to

the Hearing Officers' reasonable determination based on the Hearing Officer's in-person observations over seven (7) days of hearing.

The Board has a long-established, and recently affirmed, rule and policy not to overrule an administrative law judge's credibility determinations unless the "clear preponderance" of the evidence shows that they are incorrect. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951); *Flexsteel Indus.*, 316 NLRB 745 (1995); *Portola Packaging, Inc.*, 361 NLRB No. 147 (Dec. 16, 2014) Here, there is no clear preponderance of the evidence that the Hearing Officer's credibility findings were incorrect. In fact, the Hearing Officer gave sound reasoning as to why the Union witnesses were credited over the Employer witnesses. It is also important to note that there was not a significant dispute regarding the primary allegations of what was communicated at the meetings, but instead the main dispute was whether what was said and communicated was objectionable.

The Employer appears to argue that the Union's witnesses should not be credited because the Hearing Officer had previously found that some of the Union's witnesses were not credible in other parts of their testimony. As the Hearing Officer correctly pointed out, all of a witness' testimony does not have to be discounted simply because a hearing officer found some of it less than reliable. *See Upper Great Lake Pilots*, 311 NLRB 1313 (1993); *Maximum Precision Metal Product*, 236 NLRB 1417 (1978). More importantly, the Hearing Officer did not find other portions of all of the Union's witnesses "unreliable," only three of the Union's seven witnesses on this topic, and only small portions of their testimony. Also, the Employer's own witnesses, such as Randi Graham, Kevin Gritsch, and Tony Chaam's testimony regarding this matter were consistent with the Union witnesses' testimony.

The Employer also argues that the Union witnesses were inconsistent. First, the Employer argues that there was no consensus regarding the number of employees at the meetings where the Union promised wage increases. However, as the Employer's witnesses testified, there were several meetings at each location and therefore it is likely that the Union's witnesses were at different meetings, and there were also different numbers of employees at each meeting. Furthermore, the number of employees at the meeting is irrelevant to the inquiry. The content of the meetings is what

is important and the Union witnesses' testimony was consistent in that regard, and the Employer has failed to argue that their testimony regarding the content of the meeting is inconsistent.

Second, the Employer argues that some employees testified that Oliver Bell, a consultant, and Randy Wittig, the Employer's vice president, referenced a 12.5 percent increase for Santa Fe Springs and others testified that Bell referenced a 12.45% increase. This is a minuscule difference, regarding a statement at a meeting four (4) months prior to their testimony. Surely, a difference of .05 percent is not significant and is not grounds for overturning the Hearing Officer's reasoned credibility findings. Simply, the Employer has not made any argument to show that the "clear preponderance of the evidence" shows that the Hearing Officer's credibility findings were incorrect and therefore the Hearing Officers credibility findings must be upheld.

2. ***The Hearing Officer Correctly Applied the Law.***

The Hearing Officer correctly applied the law in finding that the Employer made improper and objectionable promises of wage increases[1].

As the Hearing Officer found, the instant case is nearly identical to *G&K Services*, 357 NLRB No. 109 (2011) Just like in *G & K Services*, the Employer in the instant case won a representation election in Santa Fe Springs shortly before the Union City/Stockton election, announced that fact to the employees, and shortly thereafter announced that the employees in Santa Fe Springs had almost immediately received a wage review and an average of 12.45% wage increases[2]. Like the Board found in *G & K Services*, and as the Board commented in *Zero Corp.*, 262 NLRB 495, 510 (1982), "any reasonably intelligent concerned employee" would view the information provided as a promise that they would receive the same review and wage increases if they rejected the Union. Indeed, the employees, including the Employer's own witnesses, viewed this information as a promise, so much to cause employees to calculate what their new wage rate would be after the 12.45% increase[3]. (Tr. 51, 177-179, 343, 424-425, 706-709, 836-839, 1564-1565, 1608-1610, 1625)

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[1] For further legal and factual discussion regarding this item, see Petitioner's Post-Hearing Brief in Support of its Objections, attached hereto as Exhibit 1, at pp. 15-24.

[2] Some employees who had been working for the Employer for a long time received as much as 25% increases. (Tr. 708, 712)

[3] Graham, the Employer's general manager in Stockton testified that there was a lot of talk about the wage increases after the meeting and that the employees were excited. (Tr. 1564-1565) Kevin Gritsch, an employee who was presented as the Employer's witness testified that he understood that the employees in Santa Fe Springs got a raise right after they rejected

The Employer, in its exceptions asserts that the cases are different because *G&K Services* was a decertification election, the alleged promise in that case was made days before the election, and there was not a comparison between union and non-union facilities. However, these minor factual distinctions have no bearing on the legal matter. Whether a decertification claim or not, it is illegal to make a promise of benefits during the critical period prior to the election. Furthermore, the promise was made eight (8) days prior to the election in *G&K Services*, and fourteen to fifteen days prior to the election in the instant case. That is simply not a significant difference to make a legal difference. Particularly, when several employees testified to the clear impact that the promises made on employees right before the election.

The Employer also argues that in *G&K Services*, the employer informed the employees that employees at the other facility "voted to get rid of their union" and that the Employer in the instant case did not say anything about another facility voting to get rid of the union. However, here, the Employer announced to all employees, several times, that the Santa Fe Springs employees rejected the Union and that the employees at Santa Fe Springs got their increases shortly thereafter. (Tr. 836-837, 1119, 1563-1564) Therefore, the Employer certainly did link the raises to employees voting against the Union in Santa Fe Springs, just as occurred in *G&K Services.*

The Hearing Officer also correctly analogized this case to *California Gas Transport Inc.,* 347 NLRB 1314, 1318 (2006), where the employer made statements about granting other locations wage increases and inferred that employees would get the same if they rejected the union. The Board held that these statements were objectionable promises because the employees would have understood that if they voted for the union they would not have received the same increase. *Id.* This is true here as well. The employees themselves testified, including the employers own witnesses, that based on Randy Wittig and Oliver Bell's statements at the meetings that they understood that they would get immediate increases if they voted against the Union and would not if they voted for the Union.

The Employer asserts that it was important in *California Gas Transport* that the employer did not tell the employees that the increases would happen regardless of the outcome of the election.

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the Union and he and other believed that the same would happen so he calculated what his new rate would be based on the 12.45% that was promised. (Tr. 1608-1610)

However, that was a very minor part of the Board's decision; the Board's decision was truly based on the impact that the statement regarding wage increases in the other facilities had on the employees. Nevertheless, the Employer argues that in the instant case Wittig made clear that the wage review would occur regardless of the outcome of the election and that distinguishes the case. However, as the Hearing Officer correctly found, the Employer clearly informed the employees both verbally and by PowerPoint that if the Union won the election that the increases from the wage review would take several months to be implemented because it would have to go through the bargaining process, which would take several months. The Employer further said that a "reasonable person" could assume it would get the same treatment as in Santa Fe Springs. Therefore, the Employer clearly implied that the increases would not be given in the same manner if the employees voted in favor of the Union, and the Board has consistently found that such conduct is objectionable[4].

The only case the employer suggested as more applicable to the instant case is *Winkle Bus Co.*, 347 NLRB 1203, 1205 (2006). The facts there are not even close to the facts in the instant case. In *Winkle Bus Co.*, the employer's comment concerned an unrelated employer and was simply about the potential negatives of collective bargaining. There was no discussion about specific increases at a location that the employer had control over. In this case, the Employer informed employees that its own employees at another location received a 12.45 percent increase almost immediately after rejecting the Union, and that a reasonable person could assume that the same would happen in Stockton and Union City if the employees rejected the Union. The *Winkle Bus Co.* case simply is not analogous in any way to the facts here and the Employer's attempt to distract from the true issue at hand should be rejected.

As the Hearing Officer correctly found, the instant case is nearly identical to *G&K Services* and *California Gas*, where the Board correctly found that the employer made objectionable promises

[4] The Employer also asserts that it was within its rights to tell employees about the wage increases because the wage increases were planned prior to the petition. However, there is no evidence that that is true other than Wittig's self-serving and uncorroborated testimony. Indeed, Wittig testified that the employees were not informed of any wage review or planned wage increases prior to the petition. (Tr. 1117-1118) The Board has held that a promise of increased wages is unlawful unless it informed the employees prior to the petition and that if there is not a concrete plan and set implementation date then the promise is presumed to be unlawful. *Divi Carina Bay Resort*, 356 NLRB No. 60 (2010); *Crown Tar & Chem. Works,* 365 F.2d 588 (10th Cir. 1966) Here, the Employer never announced such a wage increase or wage review until after the petition and therefore the promise is clearly unlawful.

of wage increases and set aside the election. The Board should therefore reject the Employer's exception and adopt the Hearing Officer's finding regarding Objection 4.

B. <u>The Board Should Adopt the Hearing Officer's Finding That the Employer Made Objectionable Threats That Employees Would Lose Benefits.</u>

The Hearing Officer recommended to sustain Objections 6 and 11, finding that the Employer's agents threatened that it would eliminate the Core bonus program and that it would no longer be lenient and flexible if the employees voted in favor of the Union. The Employer has excepted to these recommendations. For the reasons set forth below, the Employer's exceptions should be rejected.

1. ***The Hearing Officer's Factual Findings Were Correct.***

a. *Threat Regarding the Core bonus program*

The Core bonus program is a program where the drivers attempt to obtain scrap bumpers from customers and the Employer pays the drivers $1.00 per core bumper that they bring in. (Tr. 186) The Hearing Officer found that Rolando Bellido made a threat to Terrell Ellis that if the Union "infiltrated" the company that the Employer would eliminate the Core bonus program. The Hearing Officer also found that Ellis told another employee, Alfonso, and that at least two other employees were aware of the threat made by Bellido. (HO Report at 19)

The Employer excepts to the Hearing Officer's determination asserting that the Hearing Officer incorrectly relied on testimony from Terrell Ellis that he told Alfonso about losing the core bonus. The Employer says that is inconsistent with the testimony. However, the Employer is incorrect on that point. Ellis testified that he spoke with Alfonso directly and that when the threat of losing the Core program was raised that Alfonso told him that would be bad for him because he relies heavily on the Core program and just bought a new house. (Tr. 187) The Hearing Officer's determination that Ellis told Alfonso about the threat is consistent and reasonable from Ellis' testimony. Furthermore, the Employer is incorrect in asserting that there is not sufficient testimony regarding dissemination. Ellis testified that he spoke with other employees, including Alfonso, about the threat. (Tr. 187) In addition, the Employer's own witness, Rolando Bellido admitted to making a statement to Ellis about eliminating the Core program and testified that Alfonso and Brad King,

another driver in Stockton, both talked to him about the Core program and were upset about the idea that it may be taken away. (Tr. 1438-1439) The Hearing Officer's factual determinations are supported by the evidence.

b. *Threat to Not Be Flexible and Lenient*

The Hearing Officer also made the conclusion that Randi Graham, the manager in Stockton threatened Ellis, Cervantes and other employees that the company would be less lenient and flexible with the employees if the Union was elected. It was important in the Hearing Officer's findings, that she made these statements at the same time that she told the employees how she was taking the petition very personally. (HO Report at 20-21) These statements were corroborated by Rolando Bellido and Randi Graham's testimony admitting that Graham made statements to Ellis and other employees about the employees losing flexibility and certain benefits, and that there would no longer be "gray" areas. (Tr. 1411-1412, 1535-1537)

The Employer argues that the Hearing Officer's factual findings are tenuous because the only employees who testified were Ellis and Max Cervantes. However, Ellis and Cervantes' testimony was corroborated by Graham and Bellido, as discussed above. Furthermore, the Hearing Officer's findings were largely based on credibility findings, specifically that, the Hearing Officer discredited Graham's denial that she threatened to be less flexible with employees because her testimony was vague and she did not seem forthright, but instead evasive. (HO Report at 20) The Hearing Officer's credibility findings should be not be disturbed particularly when based on decisions related to a witnesses' demeanor, since the Hearing Officer is the only one who was exposed to seeing and experiencing her demeanor. *See Hornell Nursing & Health*, 221 NLRB 123 (1975).

2. ***The Hearing Officer Correctly Applied the Law***

a. *Threat Regarding the Core bonus program*[5].

The Employer excepts to the Hearing Officer's finding that Bellido's statements regarding the Core bonus program were objectionable. The Employer argues that it is absolutely permitted to explain to employees how things might be in the facility if a union were voted in. That is simply not true, it is only permissible under certain guidelines. As the Hearing Officer held, the Board law is

[5] For further legal and factual discussion, see Exhibit 1, at pp. 31 - 33.

clear that an Employer is only allowed to make such comments when based on relevant and objective facts, but that if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and without the objective facts, then such predictions are not protected. (HO Report at 19). *See NLRB v. Gissel Packing, Co.*, 395 U.S. 575 (1969); *Target Corp.*, 359 NLRB No. 103, slip op. at 11 (2013); *Homer D. Bronson Co.*, 349 NLRB 512 (2007).

The testimony is clear that Bellido did not explain to the employees that the Core program could go away in collective bargaining or provide other objective facts for why the Core program would be taken away. Instead, the tone of the comment, referring to the Union "infiltrating" the company makes clear that he was implying that the Employer would take action for reasons unrelated to economic necessities and therefore the Hearing Officer correctly found that these statements are objectionable, consistent with Board precedent.

The Employer also attempts to downplay the significance of this threat. However, the evidence shows that this statement had a significant impact. There are fifteen (15) drivers in Stockton and many rely heavily on the income from the Core bonus program, including being able to make up to five hundred dollars ($500.00) a pay period. (Tr. 186-187) Furthermore, Ellis talked to several employees about this, including one who was clearly upset about the prospect of losing the Core program. (Tr. 186-187) It was clearly a hot topic of conversation among the drivers; further evidenced by the fact that Bellido testified that Alfonso and Brad King confronted him about the issue. (Tr. 1438-1439) Given that this impacts fifteen (15) employees out of fifty (50) in the unit, almost double the vote differential of eight (8), and there was clearly widespread dissemination, the issues was significant and the Hearing Officer was correct in finding that the threat tended to interfere with the employees' free choice.

b. *Threat to Not Be Flexible and Lenient*[6].

The Employer also excepts to the Hearing Officer finding that the Employer committed objectionable conduct through Graham's threats that there would be less flexibility, and that

[6] For further legal and factual discussion, see Exhibit 1 at pp. 33-35.

employees would lose certain benefits if they vote for the Union. However, the Hearing Officer correctly applied the law.

As the Hearing Officer found, recently, the Board held that threats of stricter enforcement of work rules for supporting the union is a violation of section 8(a)(1) and is objectionable because it destroys the laboratory conditions during the critical period. (HO Report at 20) *See Olympic Supply d/b/a Onsite News*, 359 NLRB No. 99 (2013). In this case, the credited testimony clearly shows that Graham specifically told employees that the Employer would be less flexible if the Union were voted in and that is objectionable conduct according to *Olympic Supply.*

The Employer cites to several cases where the Board found that there was not a violation because the employer explained it would be less flexible if there were certain provisions in a collective bargaining agreement. However, the Hearing Officer correctly distinguished those cases because there is no credited testimony in the instant case that Graham ever referenced that the loss of flexibility would be due to a provision in a collective bargaining agreement. Instead, Graham's threats were broader and her prediction was that all "perks" would go away and the predictions were unrelated to whether the perks were restricted by a collective bargaining agreement or not. This was particularly true given that these threats were prefaced by her angry statement to the employees that she was taking the Union petition very personally. (Tr. 44-46, 185-186, 1411-1412, 1605) Therefore, the facts of the instant case are certainly more similar to that in *Olympic Supply* and *Miller Industries Towing Equipment Inc.*, 355 NLRB 1074 (2004) because Graham made a broad threat not referencing that such loss of flexibility would only occur if there was a provision of a collective bargaining agreement that prohibits such flexibility; and therefore implying that it would be in retaliation for voting for the Union[7].

The Hearing Officer correctly applied the law in regard to both threats and therefore the Board should reject the Employer's exception.

[7] Also, importantly, some of the benefits that Graham threatened would be taken away could not be restricted by a collective bargaining agreement, such as taking time to participate in school activities, because such time is required by state law. *See* Cal. Labor Code §230.8.

C. The Board Should Adopt the Hearing Officer's Finding That the Employer Improperly Interrogated Employees.

The Hearing Officer sustained the Union's Objection 9 related to interrogation of Tolopa-Jo Faumuina and the interrogation of Morgan Crowl. The Employer excepts to the recommendation contesting the Hearing Officer's factual findings and legal conclusions. The Employer's exceptions should be rejected.

1. *The Hearing Officer's Factual Findings Were Correct*

a. *Interrogation of Faumuina*

Faumuina, a driver in Union City, testified that during ride-alongs, he was interrogated by management employees including Carol Romero, Bob Alberrico, Chavin Prum and Don Mathews. (Tr. 327-335) He specifically testified that the management employees asked him what he thought about the Union and what it would mean for him, and that Romero asked him who else supported the Union and who the biggest supporters were. (Tr. 327-329, 332) Prum testified and denied the allegation but the other management employees did not testify.

The Hearing Officer credited Faumuina over Prum and therefore accepted his testimony as true. The Employer excepts to this finding arguing that Faumuina's testimony was vague and exaggerated. However, the Hearing Officer correctly found that Faumuina was credible based on his demeanor, because he was forthright and candid and had a sincere expression. She contrasted this with Prum who "took long pauses before answering and was vague and seemed to be withholding information." (HO Report at 27) As discussed above, a Hearing Officer's credibility findings, particularly when based on a witnesses' demeanor should not be disturbed unless the preponderance of the evidence shows that they are not correct. In this case, there certainly is not a preponderance of evidence showing that Faumuina's version is incorrect. Furthermore, the Hearing Officer correctly made an adverse inference that Faumuina's testimony was accurate because the Employer did not call Romero, Alberrico, or Mathews to rebut the testimony.

The Employer also asserts that the Hearing Officer's findings regarding dissemination were not accurate. However, the Employer is wrong. When being questioned about the interrogations Faumuina testified that he told his co-workers Norman, Brandon, and Eric[8] what was said to him

[8] Clearly this refers to Norman Panado, Eric Stevens, and Brandon Marable as the Hearing Officer correctly discerned.

during the ride-alongs, clearly referring to the interrogations. (Tr. 377, 395, 864-865) Therefore, the factual findings regarding dissemination are certainly supported by the record.

b. *Interrogation of Crowl*

Crowl, a former temporary employee in Union City, testified that in mid January 2015 Chavin Prum, the Union City General Manager, brought Crowl into a room and asked Crowl what he thought about the Union, and who was supporting the Union; and asked Crowl to provide him information about who was supporting the Union in the future. (Tr. 478-480) Crowl told him he was not comfortable with that, left and told at least three (3) full-time employees about the questions that Prum asked him. (Tr. 481-483, 717-720) Prum denied that this occurred.

The Hearing Officer credited Crowl over Prum. The Hearing Officer made this credibility finding because she found that Crowl was forthright and candid and had a sincere expression and made eye contact. On the other hand, the Hearing Officer said that Prum took long pauses before answering questions and was vague and evasive. Furthermore, the Hearing Officer found that Crowl's version had more details. (HO Report at 29) It is also significant that Marable corroborated Crowl's testimony. (Tr. 717-720)

The Employer excepts to the credibility findings but, as discussed above, a Hearing Officer's credibility findings, particularly based on demeanor, should not be disturbed and there is certainly not a preponderance of the evidence showing that the Hearing Officer's findings are wrong. The Employer asserts that Crowl was inherently unreliable because he was only a temporary employee and was recently terminated. However, the fact that Crowl no longer works for the Employer makes his testimony more likely to be credible, as he no longer has an interest in the Union because he is not employed there, so it would have been easier for him to simply not be involved. Therefore, his testimony is actually more reliable as he does not have a reason to lie. On the other hand, Prum was the new General Manager at the time of the petition and was tasked with ensuring that the Union did not win the election, therefore he clearly has a reason to lie and ensure that there is not a re-run election. He also would surely not admit to interrogating employees at hearing because he had been trained that it was unlawful and knew that such an admission would have negative consequences for

the Employer. (Tr. 1147-1148) Furthermore, these are all considerations that are part of the Hearing Officer's credibility findings which should be given weight.

The Employer also argues that the issue is irrelevant because Crowl's testimony did not relate to interrogation but instead spying and that was not part of the objections. However, that is simply not true. Prum aggressively questioned Crowl about his sympathies and the union sympathies of other employees. This is certainly interrogating Crowl to get information and that, as will be discussed below, is unlawful interrogation.

2. ***The Hearing Officer Correctly Applied the Law[9].***

a. *Interrogation of Faumuina*

The Employer excepted to the Hearing Officer's legal conclusion, but gave very little argument as to why the legal conclusions were wrong. The Employer simply cited cases that it implies shows the Hearing Officer legal conclusions are wrong but the Hearing Officer addressed those cases at length and clearly distinguished them in the report. The Employer did not argue why the Hearing Officer's distinctions were incorrect. The Hearing Officer made clear findings for why the interrogations interfered with, restrained, or coerced employees including that he was questioned by members of management while he was constrained in an Employer vehicle, asked about other employees, and that he had never informed the Employer of his Union sympathies prior to the interrogations[10]. (HO Report at 27) The Hearing Officer's decision was consistent with Board law and therefore should be adopted.

b. *Interrogation of Crowl*

The Employer's exception to the Hearing Officer's legal conclusion related to the interrogation of Crowl is based on Crowl being a temporary employee. However, the Employer did not present any case law to or persuasive argument on this point. Importantly, the Hearing Officer correctly found that Prum's conduct in interrogating Crowl was objectionable because Crowl

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[9] For further legal and factual discussion regarding the issues of interrogation, see Exhibit 1 at pp. 53-58.

[10] These findings are consistent with Board precedent. The Board has ordered an election be set aside when a supervisor unlawfully interrogated an employee as to whether she knew if another employee was in the union or supported the union. *See Portola Packaging, Inc.*, 361 NLRB No. 147 (2014) The Board has similarly found an interrogation that took place in a CEO's vehicle to be coercive and therefore objectionable. *See King Span Insulated Panels*, 359 NLRB No. 19 (2012). An interrogation in a company vehicle during a ride-along that could take up to ten (10) hours would also be coercive and intimidating.

disseminated the information regarding the interrogation to at least three (3) employees and Marable disseminated information about the interrogation further. Therefore, the Hearing Officer correctly found that the conduct was objectionable because it was disseminated to several voting employees, particularly the fact that Prum was asking to know who was supporting the Union which would have chilled employees from overtly discussing their Union sympathies. The Hearing Officer's legal conclusions were correct and should be adopted.

D. <u>The Board Should Adopt the Hearing Officer's Finding That the Employer's Objectionable Conduct Interfered with Employee's Free Choice and That the Election Should Be Set Aside.</u>

The Employer excepts to the Hearing Officer's recommendation that the election be set aside and that a new election be ordered. The Employer's argument is based primarily on an assertion that the Hearing Officer did not follow the legal standard for overturning the election by not considering all of the factors set forth in *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995) However, there is no discussion of such factors set forth in *Cambridge Tool*, and the Board certainly did not take on such a formulaic approach as is encouraged by the Employer. In fact, in *Cambridge Tool*, the Board reversed the ALJ and decided to set aside the election and overrule based on three incidents of objectionable conduct relating to only two employees, which was much less severe and pervasive than is the case here. *Id.* The Employer also asserts that the there was not sufficient evidence to show that the Employer's conduct actually coerced employees. While the Union asserts there is ample evidence that the Employer's conduct coerced employees, the Hearing Officer correctly set forth the standard, stating that the test is not whether the conduct in fact coerced employees but instead whether it reasonably tended to interfere with the employees' free and un-coerced choice. (HO Report at 2) *See Baja's Place*, 268 NLRB 868 (1984); *Pearson Education, Inc.* 336 NLRB 979, 983 (2001) citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970)

First, the Employer's promised wage increases is enough on its own to set aside the election. The Employer argues that a small number of employees were at the meetings but that is simply not the case. The Employer made clear that it had meetings to discuss the wage increases with all employees. Furthermore, in *G&K Services*, *supra*, the promise of wage increases was the only objectionable conduct and the Board ordered that the election be set aside. As discussed above, in

this case, the Employer's conduct is almost identical to that of the employer in *G & K Services Inc.* and therefore the promised wage increases is sufficient on its own to elicit a finding that the Employer's objectionable conduct reasonably interfered with employees' free choice.

The Employer asserts that the alleged objectionable conduct was not severe or egregious. That is simply not a credible argument. The Employer impliedly promised a 12.45% increase to all fifty (50) employees if they voted against the Union. This is certainly a large wage increase for employees who had not had wage increases for some time, and therefore not only would tend to coerce employees but did in this case as witnesses for both sides testified. The Employer also threatened to do away with a bonus program that allows some employees to make up to $1,000.00 per month off of, so a significant financial cut. The Employer also aggressively interrogated employees about their Union sympathies in confined areas, and those incidents were disseminated to other employees. These five (5) incidents are certainly more severe and egregious than the three objectionable incidents in *Cambridge Tool & Mfg., supra*, where the Board reversed the ALJ's determination that the conduct was *de minimis* and ordered that the election be set aside.

The Employer also argues that there were very few people that were subject to the alleged objectionable conduct. Again, that is a clear misrepresentation of the facts. All employees in the bargaining unit attended a meeting, albeit not all at the same exact time, where the Employer discussed the wage increases and made the objectionable promises using the same PowerPoint presentation. Furthermore, fifteen (15) drivers at Stockton would have been impacted by the Employer taking away the Core bonus program and clearly most of the drivers heard about it, as there is evidence that drivers were talking about it and at least two drivers confronted Bellido about it. Ellis testified that there were several employees in the meeting where Graham made the threats and Bellido also testified that there were several employees in a meeting where Graham discussed flexibility. (Tr.185-186, 1411-1412) Finally, Crowl and Faumuina both disseminated information regarding the interrogations to at least three (3) employees and some of those employees, such as Marable, disseminated the information to more employees. The objectionable conduct reached all employees in some form or another, particularly the egregious implied promise of a 12.45% wage increase.

The Employer also asserts that the conduct occurred too far away from the election and that there is not evidence that the conduct persisted in the minds of the employees. That is not true. The Employer promised wage increases two weeks prior to the election and it is clear that several witnesses testified regarding the impact of these wage increases and how much it impacted employees' choice, and that some employees even asked when they were going to get the raises immediately after the election results were announced. (Tr. 845) Furthermore, the issue regarding the Core bonus program continued to persist because Alfonso and King confronted Bellido about it. Certainly, all of the objectionable conduct created a tone and environment that destroyed the laboratory conditions right up until the date of the election.

The Employer also argues that the Employer mitigated the objectionable conduct, specifically in regard to the promised wage increases, when Wittig and Bell clarified that they were not making a promise. However, in *G&K Services, supra*, the employer also told the employees that they were not making a promise but the Board found that that was not enough to eliminate the employer's liability and the Board set aside the election. The same is here too, the Employer was simply attempting to have an argument that it was not making a promise, while the employees certainly understood the statements to be a promise.

Finally, the Employer argues that the election was not close and therefore the objectionable conduct could not have affected the vote. Again, that is not true. There were fifty (50) employees who voted and the Employer only won the election by a mere eight (8) votes. Given that the Employer promised wage increases to all fifty (50) employees, that the Core bonus program affects at least fifteen (15) employees, and that the other objectionable conduct was disseminated to at least five (5) employees and probably more, this unlawful conduct clearly could have and did sway the outcome of the election[11]. There is ample evidence of the impact that the promised wage increases had on employees' free choice.

When there is objectionable conduct, the Board sets aside the results of the election unless the objections are *de minimis.* Here, the severe and pervasive conduct that permeated the bargaining

[11] The Union has also excepted to the Hearing Officer's decision regarding Objection No. 8 and the ride-alongs. Should the Board reverse the Hearing Officer's decision that is additional objectionable conduct that impacted over half of the bargaining unit and persisted throughout the critical period between the filing of the petition and the election.

unit throughout the critical election period is simply not *de minimis* and is far greater than many other cases where the Board has rightfully set aside the election. Therefore, the Hearing Officer's recommendation that the election be set aside is consistent with Board law and precedent and should be adopted.

III. CONCLUSION

For the foregoing reasons, Petitioner requests that the Board reject Respondent's exceptions and adopt the Hearing Officer's recommendations regarding Objections Nos. 4, 6, 9, and 11, and order that the election be set aside and that a new election be conducted.

Dated: October 6, 2015

BEESON, TAYER & BODINE, APC

By: _____
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EXHIBIT 1

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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

TEAMSTERS LOCAL 853, Petitioner, v. KEYSTONE AUTOMOTIVE OPERATIONS, INC., Respondent.	Case No. 32-RC-137319 **PETITIONER'S POST-HEARING BRIEF IN SUPPORT OF ITS OBJECTIONS**

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I. INTRODUCTION

The issue before the Regional Director is whether Keystone Automotive ("Respondent" or "the Employer") engaged in objectionable conduct as alleged by Teamsters Local 853 ("Petitioner" or "the Union.") A representation election was held for a bargaining unit that included employees at the Employer's Stockton[1] and Union City facilities. After the final vote tally, there were more 'No' votes than 'Yes' votes. However, the election was not held in the required "laboratory conditions", but took place after the Employer engaged in a five-month relentless campaign of threats, interrogations, surveillance, and unlawful promises. Simply, the Employer blatantly violated the law in a cynical, yet successful, attempt to ensure it obtained its desired result. The Union alleged several incidents of objectionable conduct and supplied sufficient information to require a hearing on the vast majority of the objections. At hearing, the Union has proved that the Employer engaged in unlawful, objectionable conduct. The Employer's conduct destroyed the "laboratory conditions" necessary to ensure that employees are entitled to a free choice and to determine the employees' uninhibited desires. Therefore, the Union urges the Region to sustain the Union's objections, set-aside the election results, and order a new election.

I. PROCEDURAL FACTS

Teamsters Local 853 filed an RC-petition on September 23, 2014 to represent a group of Keystone Automotive employees working at its Stockton and Union City facilities[2]. (Bd. Exh. 1(b)). The Union petitioned for a bargaining unit that only included after-market drivers and warehouse workers. The Employer insisted on a hearing to determine the appropriateness of the bargaining unit, arguing that the unit was only appropriate if it included LKQ Salvage Driver, LKQ Shuttle Driver, Route Sales Drivers, Production Technicians, COD Accounting Clerk, Returns Clerk, and the Inside Sales Coordinator, and Dispatcher. A hearing was held on that matter over two days in early October 2014. The Regional Director issued a decision dated January 23, 2015. The Regional Director ordered an election in a unit that included the LKQ Salvage Drivers and the Route Sales Drivers,

[1] The proposed bargaining unit only includes employees at the Employer's Stockton facility located at Army Ct., and did not include its LKQ salvage facility in Stockton or its Heavy Duty Truck facility in Stockton.

[2] See Petition filed in this case and the resulting Regional Director's Decision and Direction of Election.

along with the Delivery Drivers and Warehouse Workers, but not any of the other classifications proposed by the Employer[3].

The parties and the Region agreed to a date and times for the election. The election was held on February 19, 2015.[4] (Jt. Exh. 1) The votes were tallied the next day at the Region on February 20, 2015. According to the Regional Director's Supplemental Decision on Objections and Notice of Hearing, there were 57 eligible voters. (Bd. Exh. 1(b)) There were 53 employees who voted, but 3 of those votes were challenged. (Bd. Exh. 1(b)) There were 21 votes for the Union and 29 votes against the Union. (Bd. Exh. 1 (b))

On February 27, 2015, the Union timely filed nineteen (19) objections to the conduct of the election. (Bd. Exh. 1 (a)) On March 13, 2015, the Union filed an offer of proof regarding anticipated testimony in support of each of its objections. On May 5, 2015, the Regional Director issued its Supplemental Decision on Objections and Notice of Hearing, setting fourteen (14) objections for hearing in their entirety, setting portions of three (3) objections for hearings, and overruling two (2) objections in their entirety, specifically Objection No.2 and Objection No. 8. (Bd. Exh. 1(b)) On May 26, 2015, the Union filed an exception with the National Labor Relations Board ("the Board") contesting the Regional Director's decision to overrule Objection No. 8. (Bd. Exh. 2) On June 4, 2015, the Board held that the Union raised issues of material fact regarding Objection No. 8 that could best be resolved after a hearing and therefore ordered that the Objection be remanded to the Regional Director for consideration along with the other objections that were already set for hearing. (Bd. Exh. 3)

The objections litigated at hearing are:

Objection No.1: During the critical election period, the Employer, through its managers and agents, disciplined employees and threatened to discipline employees in retaliation for their protected activities[5].

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[3] The Regional Director did not decide on the issue of whether the Dispatchers are 2(11) supervisors and allowed them to vote subject to challenge. The issue has not been determined, as their votes were not determinative.

[4] The election times in Stockton were: 5:00 a.m. to 7:00 a.m., 10:30 a.m. - 11:00 a.m., and 2:30 p.m. to 5:30 p.m. The election times in Union City were: 5:30 a.m. to 6:45 a.m., 9:30 a.m. to 10:00 a.m., and 4:00 p.m. to 6:00 p.m. (Jt. Exh. 1)

[5] Pursuant to the Regional Director's Supplemental Decision on Objections and Notice of Hearing, only allegations regarding threats were litigated at hearing. (Bd. Exh. 1(b)).

Objection No. 3: During the critical election period, the Employer, through its managers and agents, adopted and enforced discriminatory and unlawful work rules regarding solicitation of Union support.

Objection No. 4: During the critical election period, the Employer, through its managers and agents, made promises of better pay and/or benefits if the employees voted against the Union.

Objection No. 5: During the critical election period, the Employer, through its managers and agents, granted special benefits and promotions to employees who did not support the Union.

Objection No. 6: During the critical election period, the Employer, through its managers and agents, impliedly and/or actually made threats of the loss of benefits and/or other acts of reprisals against employees if they voted for the Union to become their collective bargaining representative.

Objection No. 7: During the critical election period, the Employer, through its managers and agents, implied that the employees' protected Union activities were under surveillance by the Employer.

Objection No. 8: During the critical election period, the Employer substantially increased the number of managers and agents on duty for the purpose of intimidating employees from discussing the Union and participating in protected activities, including by doing ride-a-longs with the employees.

Objection No. 9: During the critical election period, the Employer through its managers and agents, coercively interrogated employees about their own, as well as their co-workers' support for the Union.

Objection No. 10: During the critical election period, the Employer, through its managers and agents, unlawfully polled employees regarding their Union sympathies.

Objection No. 11: During the critical election period, the Employer through its managers and agents, impliedly and/or actually threatened employees that they would lose certain benefits and conditions if they voted in favor of the Union.

Objection No. 12: During the critical election period, the Employer, through its managers and agents, harassed and intimidated employees based on their Union sympathies and in order to coerce employees to vote against the Union.

Objection No. 13: During the critical election period, the Employer, through its managers and agents, adopted and enforced more restrictive rules on employees' access to the workplace in response to Union activity. Further, the Employer's enforcement of this new rule was discriminatory and based on Union activities.

Objection No. 14: During the critical election period, the Employer, through its managers and agents, made work assignments in order to isolate pro-Union employees from other employees and restrict their ability to discuss protected Union activities with co-workers.

Objection No. 15: During the critical election period, the Employer, through its managers and agents, told employees not to speak to pro-Union supporters, implying they would be disciplined or otherwise get in trouble because of those employees' pro-Union activities.

Objection No. 16: During the critical election period, the Employer, through its managers and agents, threatened and coerced employees by stating that if the employees selected the Union as their collective bargaining representative, that everything would return to zero, and bargaining would start at zero.

Objection No. 17: During the critical election period, the Employer, through its managers and agents, coerced employees by stating that if the employees selected the Union as their collective bargaining representative it would be futile and the Employer would never agree to anything in bargaining.

Objection No. 18: On election day, the Employer, through its managers and agents unlawfully engaged in surveillance and intimidation on (sic) employees around the voting area.

Objection No. 19: On election day, the Employer, through its managers and agents, engaged in unlawful electioneering at and around the polling locations.

A hearing on these objections was held at Region 32 in Oakland commencing on June 4, 2015. The hearing was held for seven (7) days and concluded on June 12, 2015. The parties both requested to file post-hearings briefs. Region 32 granted a request for the briefs to be due on June 22, 2015.

II. STATEMENT OF FACTS

This section will simply deal with the general layout of the Company and the facilities involved. Facts related to each objection will be set forth in the argument section for each objection.

1. General Corporate Background

Keystone supplies aftermarket automotive parts to body shops. It is a national corporation, and affiliated with LKQ. LKQ produces and sells salvage automotive parts. Bob Alberico is corporate Human Resources Director, based out of Chicago, however, Alberico was involved in this election campaign, as he visited both the Stockton and Union City facilities and took part in employee meetings regarding the Union. Randy Wittig is the Regional vice-president of the Western Region, overseeing operations in California, Nevada, New Mexico, Arizona and El Paso. (Tr. 1076) Wittig was also involved in the election campaign by regularly visiting both facilities, conducting employee meetings to discuss the Union, and performing ride-alongs with the employees. Wittig was the Employer's representative at hearing and was present for all but the last day of the hearing. Jerry Elwood is the Regional Manager who oversees several locations, including the Stockton and Union

City facilities. During the Union campaign, Elwood was primarily based in Union City and worked almost exclusively out of the Union City facility for all but a few weeks. (Tr. 1018-1019)

2. Union City Facility

The Union City facility performs work for both Keystone aftermarket operations and LKQ salvage operations. There are approximately fourteen (14) aftermarket delivery drivers, two route salesperson, and approximately eight (8) LKQ salvage delivery drivers. In addition to the drivers, there are approximately five (5), or a few more, warehouse workers. There are also three (3) dispatchers.[6]

Chavin Prum is the General Manager of the Union City facility. He became General Manager on September 24, 2014, the day after the petition was filed. (Tr. 1137, 1201)The previous General Manager, Marlin Cobb, was unilaterally reassigned. (Tr. 1011, 1204) Prum did not specifically apply for the position but was promoted to that position, though he testified that it was not clear if it was permanent or interim. (Tr. 1208-1209) The Employer told Prum the evening that he was promoted to General Manager that there was a Union organizing drive in progress and that one of his main objectives was to ensure that it was defeated. (Tr. 1207-1208) Salvador Torres was the Warehouse Manager from the time the petition was filed until January 2015 when he resigned. (Tr. 983, 1043) Priscilla Cobb was the Production Manager, who was in charge of the production and sales side of the business, but also assisted the drivers with issues on the routes and dealt with other office matters, from the time the petition was filed until she resigned. Joseph "Jo Jo" Lopez was a warehouse worker who took over Torres' duties in January 2015 and told other employees that he was the new Warehouse Manager. (Tr. 401, 486-490, 692, 1042-1043)

3. Stockton Facility

The Employer has three (3) facilities in Stockton, but the Keystone aftermarket facility located on Army Court is the only facility at issue in this election. There are fifteen aftermarket drivers. There are also thirteen (13) warehouse workers. Those warehouse workers are divided into

[6] The Union contends that the dispatchers are section 2(11) supervisors and not eligible to vote. At the time of the petition, there was one full-time dispatcher and one part-time dispatcher. However, during the critical period, Antonio "Tony" Jaime, previously a driver, was promoted to a Dispatcher position. (See discussion in argument section)

three (3) departments: Shipping, Returns, and Receiving. There are six (6) employees in the Shipping department, two (2) employees in Returns, and six (6) employees in Shipping.

The General Manager is Randi Graham and she has been General Manager since 2013, and had been the Site Manager supervising the drivers and warehouse workers since 2011. (Tr. 1522-1523, 1565) Prior to the filing of the Union petition Rolando Bellido was the Dispatch Supervisor, overseeing the drivers.[7] (Tr. 1353-1354) Almost immediately after the petition was filed he was moved into the warehouse to be the lead person overseeing the Shipping Department. (Tr. 1532-1533) Byron Manabe is the Warehouse Manager who oversees and supervises the entire warehouse, but since the petition was filed, he was primarily responsible for Receiving and Returns. (Tr. 1355) Harvey Nelson is a Warehouse Lead and is specifically responsible for the Receiving Department. (Tr. 1537-1538) According to Graham, while he works in the warehouse doing order selecting and other jobs, he also spends a lot of his time in the office directing the other Receiving employees. (Tr. 1537-1538)[8]

4. Santa Fe Springs Facility

The Santa Fe Springs facility is not involved in this election, but at the same time, played a significant role in the campaign, as discussed below. A different Teamsters local union filed a petition for representation of the employees in Santa Fe Springs in October 2014. (See 21-RC-140725) That election was held on December 18, 2014 and the results certified on December 30, 2014. (See 21-RC-140725) The Union did not win the election. (Tr. 1554-1555) The Employer informed the Stockton/Union City employees of this result immediately by posting a flyer around the facilities and hosting a morning meeting to read the posting. (Tr. 42-43, 341, 1554-15551)

Within a few weeks of the Santa Fe Springs election results, the Employer did salary reviews of all its employees who work at Santa Fe Springs and informed them that they were getting significant increases. (Tr. 1119, 1563-1564; Er. Exh. 10) On average, the employees received wage increases of 12.45% and many got approximately $2 increases to $15 per hour. (Tr. 1121-1122; Er.

[7] He performed essentially the same tasks as the dispatchers in Union City, including Antonio "Tony" Jaime.

[8] The Employer has asserted and continues to assert that Nelson is a 2(11) supervisor. (Tr. 1537-1538) Nelson's duties are almost identical to the duties that Joseph "Jo Jo" Lopez took on in January 2015. (See discussion in argument section below)

Exh. 10) In fact, some of the long-serving employees received up to 25% raises. (Tr. 708, 712) The Employer hosted lengthy meetings in Stockton in mid-January and in Union City in early February to discuss these increases. (Tr. 1089-1090, 1511) The Employer told the employees at these facilities about the raises that occurred in Ontario and Santa Fe Springs and, as discussed below, implied that the same would occur if the Union City and Stockton employees rejected the Union. As discussed below, this implied promise significantly interfered with the election in the Stockton and Union City bargaining unit.

III. ARGUMENT

A. The Standard for Election Objections

In election proceedings, the Board is tasked with providing "a laboratory in which an experiment may be conducted, under conditions as nearly as possible, to determine the uninhibited desires of the employees." (*General Shoe Corp.*, 77 NLRB 124, 127 (1948).) Where the results of the election are the products of extraneous and coercive influence and, therefore, do not represent the free and uninhibited choice of the employees, the Board must set aside the results and order a new election. *Id.*

The critical period during which the Board generally considers objectionable election conduct "commences at the filing of the representation petition and extends through the election." (*E.C. Electric, Inc.*, 344 NLRB 1200, 1240 n. 6 (2005).) Here the critical period is from September 23, 2014 through February 19, 2015.

Pre-election conduct that is an unfair labor practice is, a fortiori, conduct which interferes with the results of the election, "unless it is so de minimis that it is 'virtually impossible' to conclude that [the violation] could have affected the results of the election.'" (*Airstream, Inc.*, 304 NLRB 151, 152 (1991), *enf'd*, 963 F.3d 373 (6th Cir. 1992) (quoting *Enola Super Thrift*, 233 NLRB 409 (1977).)

Additionally, "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice . . ." under the Act. (*General Shoe*, 77 NLRB at 127.)

The Board will set aside an election where the misconduct taken as a whole has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the

election." (*Cambridge Tool & Manufacturing Co.*, 316 NLRB 716 (1995).) In determining whether misconduct could have affected the results of the election, the Board considers the number of violations, their severity, the extent of dissemination, and the size of the unit. Other factors the Board considers include the closeness of the election, proximity of the conduct to the election date, and the number of unit employees affected. (*Bon Apetit Management Co.*, 334 NLRB 1042, 1044 (2001).) The test is an objective one. (*Hopkins Nursing Care Center*, 309 NLRB 958 (1992).)

In this case, under the appropriate standards as set forth above, the Employer has engaged in significant conduct that clearly and substantially interfered with the employees' freedom of choice. Therefore, the election should be set aside and the Regional Director should order a second election.

B. The Employer Violated Objection No. 1 and Infringed on Employees' Free Choice By Threatening to Discipline Employees in Retaliation for Protected Activities.

Direct threats to discharge or discipline union adherents as a means of influencing a union organizational drive constitutes unlawful interference. (*NLRB v. Neuhoff Bros. Packers*, 375 F.2d 372, 5th Cir. 1976) (discussing flagrant election campaign violations).)

1. The Employer Threatened to Discipline Employees in Stockton for Protected Activity.

The Employer, through its agent, Rolando Bellido, who was a Dispatch Supervisor and Shipping Lead in the Stockton warehouse, threatened Terrell Ellis, a known pro-Union employee, that he would be fired for trying to bring in the Union and for supporting the Union. Bellido also threatened employees not to talk to Ellis or else they may get in trouble. These threats violate section 8(a)(1), but also interfered with employees' free choice because it made employees scared to speak with pro-Union employees and to openly support the Union.

Terrell Ellis was a known Union supporter. In fact, the Employer admitted that they knew he supported the Union. (Tr. 1420, 1469, 1534-1535) Ellis also specifically told Graham that he was supporting the Union. (Tr. 1534-1535) According to Graham, Bellido first saw a union card in July 2014 in Will Norton's truck, although Bellido testified that it was September. (Tr. 1524) Norton told Bellido to talk to Ellis because Ellis was organizing it. (Tr. 1403) Bellido told Ellis that he saw

Norton handing Ellis a card and therefore he knew that Ellis was supporting the Union. (Tr. 140) At that time, according to Ellis, Bellido told him that organizing a union could possibly get him fired. (Tr. 140) This was a clear threat that objectively would have deterred Ellis from supporting the Union, and is therefore an 8(a)(1) violation.

In addition, the Employer threatened employees not to talk to Ellis or they would get in trouble. Ellis testified that Kenneth Wright told him that the supervisors told him not to talk to Ellis because they did not want to see Wright get in trouble for affiliating with Ellis due to his union activity. (Tr. 149-150) Max Cervantes, a Returns employee in the Stockton warehouse, testified that Antoine, another employee, told him that Bellido threatened another employee not to talk to Ellis, and also not to talk to Cervantes because he's "from the other side." (Tr. 20) Furthermore, Cervantes and Ellis both testified that whenever they would speak to another employee, even for just a second, that a management employee, typically Rolando, would "shoo" them away. They would not do this if the employees were talking to others, and particularly employees that were not in favor of the Union. (Tr. 310-302) For instance, Ellis testified that others in his department, such as Justin Rivas, Joseph Campbell, and Harvey Nelson, could talk to any employees freely without management saying anything to them. (Tr. 222) These actions, and threats made by the Employer, had a clear impact on other employees and the "laboratory conditions." Ellis testified that employees that he had known for several years and regularly spoke with would barely even say hello to him for fear of getting in trouble for affiliating with him. (Tr. 152-154) This indicates that the employees were fearful of supporting the Union because of the threats, and negatively affected Ellis' ability to speak to employees about the Union.

2. Application of the Law to the Facts Supports the Union's Objection.

The Employer will argue first that Bellido denied making any such threats to Ellis or to any other employees. However, Ellis and Cervantes should be considered the more credible witnesses since they have much more to lose by testifying against their employer. They both continue to work

at Keystone, and are currently working without Union representation because the Union lost the election. Certainly, the Employer will not take kindly to them testifying in support of the Union, and since the Union lost the election, and a re-run election is not guaranteed, the employees would be much safer by not participating in the hearing. Instead, they chose to testify, potentially against their own personal interests. They are unlikely to lie when their testimony could possibly endanger their employment situation. On the other-hand, Bellido has every reason not to be fully truthful in his testimony. Bellido is a supervisor, his Employer is clearly against the Union, and it does not want a re-run election. Therefore, Bellido is unlikely to testify in any way that would harm his current employer's interests. Furthermore, in many respects Bellido's testimony was different from Graham's and Byron Manabe, the Warehouse Manager. Bellido's testimony did not even align with the testimony of the other Employer witnesses' because he went out of his way to make it appear as though neither he nor the Employer violated any laws. Thus, any question of credibility should be resolved in favor of Ellis and Cervantes.

The Employer will also argue that any testimony regarding Bellido making threats was hearsay. First, the statements made by Bellido threatening Ellis are not hearsay because a supervisor and agent of the Employer made them. Bellido's statements are not hearsay under the hearsay exception for admissions of a party opponent[9]. Furthermore, the rules of hearsay are not strictly applied in Board proceedings, where hearsay evidence is admissible. Although hearsay cannot be the only evidence to support a finding, the Hearing Officer may consider the evidence and assign it the appropriate weight. Here, Cervantes and Ellis' testimony that employees told them that supervisors made threats about not talking to them is confirmed by two facts. First, Cervantes and Ellis were "shooed" away from other employees by supervisors as soon as they attempted to talk with them, and

[9] The Employer may argue that these threats were made prior to the Union petition being filed and therefore was not within the "critical period." However, prepetition conduct may be considered when it "adds meaning and dimension to related post-petition conduct." (*Dresser Industries*, 242 NLRB 74 (1979), *Royal Packaging Corp.*, 284 NLRB 317 (1987).) Here, this conduct adds meaning to the actions of the Employer "shooing" away employees from talking to Ellis during the critical period and employees clearly being afraid to talk to Ellis during that time period.

second, employees who previously spoke to Ellis regularly were clearly reluctant and avoided being seen talking to him during the "critical period." (Tr. 152-154) Finally, Antoine's statement to Cervantes falls into the hearsay exception of a "present sense impression" given that he told Cervantes about the threat from Bellido immediately after it happened, and he was likely startled by the fact that a supervisor specifically told him not to talk to another employee. (Tr. 74) The Board has applied the "present sense impression" exception to accept hearsay testimony in situations such as this. See *Int'l Union of Operating Engineers, AFL-CIO, Local Union 450*, 267 NLRB 775, 794 (1983).

In sum, the evidence presented at the hearing is sufficient to prove that the Employer, through Bellido, threatened Ellis regarding organizing a union, and threatened other employees from speaking to or affiliating with Ellis and Cervantes. This conduct is not de minimis because it affected several employees in the Stockton facility, and the election results were close. Therefore, the threatening conduct likely interfered with the employees' free choice.

C. The Employer Violated Objection Nos. 3 and 13 and Infringed on Employees' Free Choice By Restricting a Pro-Union Employee's Access to the Workplace While He Was on Workers' Compensation Leave.

The Board has consistently held that employees have the right to use their employer's premises to engage in Section 7-protected activities. (See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).) This includes employees who are otherwise off-duty. (See e.g. *Timken Co.*, 331 NLRB 744 (2000); *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000).) In fact, in several cases, the Board has held that an employee has a right to access their place of employment even when on a leave of absence. (*Raleys*, 348 NLRB 382, 491 (2006).) In *Pizza Crust Co.*, 286 NLRB 490 (1987), the Board held that "the mere fact that [employees] were then on a leave of absence as a result of employment-related injuries does not deprive them of employees status [for access purposes]." Similarly, in *Southern California Gas Co.*, 321 NLRB 551 (1996), the Board held that an employee on a "leave of absence" is entitled to the same access rights as other employees based on *Republic*

three (3) departments: Shipping, Returns, and Receiving. There are six (6) employees in the Shipping department, two (2) employees in Returns, and six (6) employees in Shipping.

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election." (*Cambridge Tool & Manufacturing Co.*, 316 NLRB 716 (1995).) In determining whether misconduct could have affected the results of the election, the Board considers the number of violations, their severity, the extent of dissemination, and the size of the unit. Other factors the Board considers include the closeness of the election, proximity of the conduct to the election date, and the number of unit employees affected. (*Bon Apetit Management Co.*, 334 NLRB 1042, 1044 (2001).) The test is an objective one. (*Hopkins Nursing Care Center*, 309 NLRB 958 (1992).)

In this case, under the appropriate standards as set forth above, the Employer has engaged in significant conduct that clearly and substantially interfered with the employees' freedom of choice. Therefore, the election should be set aside and the Regional Director should order a second election.

B. The Employer Violated Objection No. 1 and Infringed on Employees' Free Choice By Threatening to Discipline Employees in Retaliation for Protected Activities.

Direct threats to discharge or discipline union adherents as a means of influencing a union organizational drive constitutes unlawful interference. (*NLRB v. Neuhoff Bros. Packers*, 375 F.2d 372, 5th Cir. 1976) (discussing flagrant election campaign violations).)

1. The Employer Threatened to Discipline Employees in Stockton for Protected Activity.

The Employer, through its agent, Rolando Bellido, who was a Dispatch Supervisor and Shipping Lead in the Stockton warehouse, threatened Terrell Ellis, a known pro-Union employee, that he would be fired for trying to bring in the Union and for supporting the Union. Bellido also threatened employees not to talk to Ellis or else they may get in trouble. These threats violate section 8(a)(1), but also interfered with employees' free choice because it made employees scared to speak with pro-Union employees and to openly support the Union.

Terrell Ellis was a known Union supporter. In fact, the Employer admitted that they knew he supported the Union. (Tr. 1420, 1469, 1534-1535) Ellis also specifically told Graham that he was supporting the Union. (Tr. 1534-1535) According to Graham, Bellido first saw a union card in July 2014 in Will Norton's truck, although Bellido testified that it was September. (Tr. 1524) Norton told Bellido to talk to Ellis because Ellis was organizing it. (Tr. 1403) Bellido told Ellis that he saw

Norton handing Ellis a card and therefore he knew that Ellis was supporting the Union. (Tr. 140) At that time, according to Ellis, Bellido told him that organizing a union could possibly get him fired. (Tr. 140) This was a clear threat that objectively would have deterred Ellis from supporting the Union, and is therefore an 8(a)(1) violation.

In addition, the Employer threatened employees not to talk to Ellis or they would get in trouble. Ellis testified that Kenneth Wright told him that the supervisors told him not to talk to Ellis because they did not want to see Wright get in trouble for affiliating with Ellis due to his union activity. (Tr. 149-150) Max Cervantes, a Returns employee in the Stockton warehouse, testified that Antoine, another employee, told him that Bellido threatened another employee not to talk to Ellis, and also not to talk to Cervantes because he's "from the other side." (Tr. 20) Furthermore, Cervantes and Ellis both testified that whenever they would speak to another employee, even for just a second, that a management employee, typically Rolando, would "shoo" them away. They would not do this if the employees were talking to others, and particularly employees that were not in favor of the Union. (Tr. 310-302) For instance, Ellis testified that others in his department, such as Justin Rivas, Joseph Campbell, and Harvey Nelson, could talk to any employees freely without management saying anything to them. (Tr. 222) These actions, and threats made by the Employer, had a clear impact on other employees and the "laboratory conditions." Ellis testified that employees that he had known for several years and regularly spoke with would barely even say hello to him for fear of getting in trouble for affiliating with him. (Tr. 152-154) This indicates that the employees were fearful of supporting the Union because of the threats, and negatively affected Ellis' ability to speak to employees about the Union.

2. Application of the Law to the Facts Supports the Union's Objection.

The Employer will argue first that Bellido denied making any such threats to Ellis or to any other employees. However, Ellis and Cervantes should be considered the more credible witnesses since they have much more to lose by testifying against their employer. They both continue to work

at Keystone, and are currently working without Union representation because the Union lost the election. Certainly, the Employer will not take kindly to them testifying in support of the Union, and since the Union lost the election, and a re-run election is not guaranteed, the employees would be much safer by not participating in the hearing. Instead, they chose to testify, potentially against their own personal interests. They are unlikely to lie when their testimony could possibly endanger their employment situation. On the other-hand, Bellido has every reason not to be fully truthful in his testimony. Bellido is a supervisor, his Employer is clearly against the Union, and it does not want a re-run election. Therefore, Bellido is unlikely to testify in any way that would harm his current employer's interests. Furthermore, in many respects Bellido's testimony was different from Graham's and Byron Manabe, the Warehouse Manager. Bellido's testimony did not even align with the testimony of the other Employer witnesses' because he went out of his way to make it appear as though neither he nor the Employer violated any laws. Thus, any question of credibility should be resolved in favor of Ellis and Cervantes.

The Employer will also argue that any testimony regarding Bellido making threats was hearsay. First, the statements made by Bellido threatening Ellis are not hearsay because a supervisor and agent of the Employer made them. Bellido's statements are not hearsay under the hearsay exception for admissions of a party opponent[9]. Furthermore, the rules of hearsay are not strictly applied in Board proceedings, where hearsay evidence is admissible. Although hearsay cannot be the only evidence to support a finding, the Hearing Officer may consider the evidence and assign it the appropriate weight. Here, Cervantes and Ellis' testimony that employees told them that supervisors made threats about not talking to them is confirmed by two facts. First, Cervantes and Ellis were "shooed" away from other employees by supervisors as soon as they attempted to talk with them, and

[9] The Employer may argue that these threats were made prior to the Union petition being filed and therefore was not within the "critical period." However, prepetition conduct may be considered when it "adds meaning and dimension to related post-petition conduct." (*Dresser Industries*, 242 NLRB 74 (1979), *Royal Packaging Corp.*, 284 NLRB 317 (1987).) Here, this conduct adds meaning to the actions of the Employer "shooing" away employees from talking to Ellis during the critical period and employees clearly being afraid to talk to Ellis during that time period.

second, employees who previously spoke to Ellis regularly were clearly reluctant and avoided being seen talking to him during the "critical period." (Tr. 152-154) Finally, Antoine's statement to Cervantes falls into the hearsay exception of a "present sense impression" given that he told Cervantes about the threat from Bellido immediately after it happened, and he was likely startled by the fact that a supervisor specifically told him not to talk to another employee. (Tr. 74) The Board has applied the "present sense impression" exception to accept hearsay testimony in situations such as this. See *Int'l Union of Operating Engineers, AFL-CIO, Local Union 450*, 267 NLRB 775, 794 (1983).

In sum, the evidence presented at the hearing is sufficient to prove that the Employer, through Bellido, threatened Ellis regarding organizing a union, and threatened other employees from speaking to or affiliating with Ellis and Cervantes. This conduct is not de minimis because it affected several employees in the Stockton facility, and the election results were close. Therefore, the threatening conduct likely interfered with the employees' free choice.

C. The Employer Violated Objection Nos. 3 and 13 and Infringed on Employees' Free Choice By Restricting a Pro-Union Employee's Access to the Workplace While He Was on Workers' Compensation Leave.

The Board has consistently held that employees have the right to use their employer's premises to engage in Section 7-protected activities. (See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).) This includes employees who are otherwise off-duty. (See e.g. *Timken Co.*, 331 NLRB 744 (2000); *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000).) In fact, in several cases, the Board has held that an employee has a right to access their place of employment even when on a leave of absence. (*Raleys*, 348 NLRB 382, 491 (2006).) In *Pizza Crust Co.*, 286 NLRB 490 (1987), the Board held that "the mere fact that [employees] were then on a leave of absence as a result of employment-related injuries does not deprive them of employees status [for access purposes]." Similarly, in *Southern California Gas Co.*, 321 NLRB 551 (1996), the Board held that an employee on a "leave of absence" is entitled to the same access rights as other employees based on *Republic*

Aviation. Therefore, disallowing access to employees on a workers compensation leave violates section 8(a)(1) of the Act and is also objectionable conduct. (*Raleys*, 348 NLRB 382, 491 (2006).)

In the instant case, the Employer specifically prohibited Adrian Nava, a pro-union employee, from accessing the workplace while he was on workers compensation leave and, in fact, escorted him from the Union City warehouse in the presence of other employees. (Tr.638-639) Nava clearly supported the Union and testified in support of the Union at the election hearing regarding the appropriateness of the bargaining unit. (Tr. 636-637) Chavin Prum, the General Manager at the Union Facility, along with other management employees were present at the hearing and knew about Nava's support for the Union. (Tr. 1259-1260) Prior to the Union petition, Nava was able to access the warehouse when submitting his workers compensation paperwork and would hang out in the break room and talk with employees, and no one ever indicated it was a problem. (Tr. 634-637) However, during the critical election period that all changed. (Tr. 637-638) On February 13, 2015, Prum saw Nava come in to the break room from the warehouse and told Nava that from then on, if he needed to bring paperwork to the facility, that he should go to the front entrance and ask for him but not enter the warehouse[10]. (Tr. 637-639) Going forward, Nava was not allowed in the facility. (Tr. 638-639) This is clearly an 8(a)(1) violation and objectionable conduct because Nava was denied access to his employer's place of business for purposes of section-7 activity.

This objectionable conduct certainly interfered with the election and the employees' free choice. First, it unlawfully deprived one of the Union's most vocal supporters from access to the facility a mere six (6) days prior to the election so that he could not discuss the upcoming election with his co-workers and share his position for why they should vote in favor of the Union. This is significant because he was not working and would have been able to talk with any of the employees while they were on break or lunch. Furthermore, the Employer's actions were disseminated to other

[10] The Employer may assert that Nava testified that this occurred in March, after the election. However, Elwood testified that it was February 13, 2015 because he knew it was the day that Priscilla Cobb quit. (Tr. 1070) Garcia also testified that this event occurred on Priscilla Cobb's last day of work. (Tr. 1275)

employees in the bargaining unit. Eric Stevens testified that Nava called him immediately after Prum escorted him out of the building and told Stevens that Prum escorted him from the building and told him not to talk to any of the guys. (Tr. 879-880) In addition, Garcia saw Prum escorting Nava from the building, and Tony Jaime was in the area as well when it occurred. (Tr. 638-639, 1266) Given that Stevens, Garcia, and Jaime knew that Nava was escorted from the building and no longer allowed to access the warehouse, it can be presumed that other employees also saw this and knew of the incident. Therefore, between the dissemination and Nava's inability to talk with his co-workers at the workplace facility, the Employer's action certainly interfered with the election and therefore, a re-run election is appropriate.

The Employer will argue that Nava was escorted from the building and not allowed in the warehouse because of complaints about how he talked to Garcia. However, the Employer's own witness, Garcia, testified that he never talked to the Employer or raised any issue regarding Nava until after Prum escorted Nava from the building and after Prum told him that Nava could no longer come to the warehouse. (Tr. 1266-1268, 1274-1275) Elwood testified that Garcia complained to him in January, a month before Nava was removed from the warehouse, but Garcia testified that was inaccurate and that he never complained about Nava. (Tr. 1266-1268, 1274-1275) In fact, he testified that the first time he responded in any manner was when he reacted to Nava calling him a "little bitch", but this was when Prum had already "kicked" Nava out of the facility and directed him to not go into the warehouse. Even at that time, Garcia never specifically said anything to Prum to complain about Nava. (Tr. 1266-1268)

Prum testified that he escorted Nava out based on complaints he heard from Elwood, but Garcia clearly testified that he did not talk to Elwood about anything regarding Nava until after the incident that occurred on February 13, 2015. Therefore, Prum could not have heard about any complaints beforehand. (Tr. 1266-1268, 1274-1275) Clearly, the Employer took action against Nava on its own, without any complaints or knowledge of any wrongful acts, and is attempting to use this

later knowledge to justify its unlawful conduct. The Employer's argument is surely pretext given that it did not know about any alleged inappropriate conduct towards Garcia before it had removed Nava.

Furthermore, a few comments to Garcia would not be sufficient to deny Nava access in these circumstances. First, Nava testified that he is always joking with his co-workers and that profanity and "shop talk" is extremely common in the facility and that in fact Garcia responded to him by saying, "Fuck you asshole." (Tr. 660) Nava testified that his exchange with Garcia was not hostile, but instead was joking, as is always the case for Nava with all of the employees. (Tr.674-675) Nava, testified that he has engaged in similar joking with Prum and that Prum had never said anything to him about his language because profanity is common in the Union City facility. (Tr. 675) Elwood verified the existence of "shop talk" in the facility and stated that he would not discipline employees using profanity because of the context of how employees talk with one another. (Tr. 1073) Garcia also testified that Nava often talks to other people in that manner and calls them names, though he was a little taken aback by the directness. (Tr. 1275) There is no evidence that any other employees were disciplined for foul language or calling people names, or that people have been otherwise denied access to the facility in those circumstances. The Employer raised one minor incident, which occurred after the decision to prohibit Nava from the facility, and is certainly not a reason to deny Nava his section 7 rights. Therefore, the Employer's conduct is objectionable.

Finally, the Employer will argue that Nava was not prohibited from standing in the parking lot to talk to employees or from using other means of communication such as Facebook to communicate with his co-workers. That may be true, but certainly talking to employees in the break room while they are on break or lunch is more effective than trying to talk to employees as they rush into work or try to leave for the day. In addition, Nava may not be friends with all of his co-workers on Facebook. Face-to-face conversations are a more direct and effective means of ensuring that co-workers hear his message. Moreover, the existence of alternative means of communication does not change the fact that the Employer denied Nava his right to access, that other employees knew about it, and that it was

because of his pro-union sentiments. Regardless of the other means of communication available to Nava, the Employer's conduct contaminated the "laboratory conditions" and interfered with employees' free choice.

For all of the above stated reasons, the Union asks the Region to find that the Employer violated Objections Nos. 3 and 13 and that this objectionable conduct interfered with the election and employees' free choice.

D. The Employer Violated Objection No. 4 and Interfered with Employees' Free Choice By Impliedly Promising to Grant Pay Increases to Employees if the Bargaining Unit Voted Against the Union.

The promise of benefits to influence the outcome of an election or organizing campaign violates section 8(a)(1). (*NLRB v. Exchange Parts. Co.*, 375 U.S. 405 (1964).) "There can be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return." (*Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944).) The Board has condemned wage increases where they were otherwise introduced in a manner calculated to influence the employees' choice. (*NLRB v. Rich's of Plymouth*, 578 F.2d 880 (1st Cir. 1978).) Therefore, the promise of a wage increase in return for rejection of the union will be treated as unlawful interference. (*NLRB v. Del Rey Tortilleria*, 787 F.2d 1118 (7th Cir. 1986).)

A factor that weighs heavily with the Board when evaluating an improper offer of benefits is whether the employer had previously told the employees of its decision to make the improvements. (*Crown Tar & Chem. Works v. NLRB*, 365 F.2d 588 (10th Cir. 1966).) If the Employer had no concrete plans for the benefit improvement and no date certain for its implementation then there is a presumption it was unlawful. (*Divi Carina Bay Resort*, 356 NLRB No. 60 (2010)).

An express promise of benefits is not required to find a violation of the Act. In *Foamex*, 315 NLRB 858 (1994), a supervisor made an unlawful implied promise of benefits by asking an employee union organizer whether "straightening out" problems with his vacation time would change

his mind regarding the union. In *G & K Services, Inc.*, 357 NLRB No. 109 (2011), a letter the employer sent to employees several days before the election--stating that employees at another facility received family health insurance coverage shortly after voting to decertify--was an objectionable implied promise of benefit.

1. The Relevant Facts at Hearing Demonstrate that the Employer Made an Implied Promise.

In this case, the Employer made an implied promise of a substantial wage increase right before the election. The implied promise interfered with the election. Several employees, including the Employer's own witnesses, testified that it was clear to the employees that if they voted against the Union that they would get substantial wage increases. The Union's witnesses testified that they talked to several employees who had been pro-union, who later changed their position and the way they would vote after the Employer made the implied promise of a wage increase. This conduct, on its own, is sufficient to require that the election results be set aside and a new election be ordered.

A representation election in the Employer's Santa Fe Springs facility took place during the same period as the Stockton and Union City facility election. The Santa Fe Springs election was held on December 18, 2014 and certified on or around December 30, 2014. The Union lost that election and the Employer posted a flyer informing employees about the vote and read the posting at a meeting. Almost immediately after the election, the employees in Santa Fe Spring were given wage increases, with those increases averaging 12.45%. (Tr. 1119, 1563-1564; Er. Exh. 10)

The Employer held a meeting in Stockton in mid-January 2015 and informed the employees of the Santa Fe Springs wage increases. (Tr. 1555-1556) The Employer displayed the figure of 12.45% on a PowerPoint presentation and encouraged the employees to call the warehouse to see how much in increases those employees received[11]. (Tr. 40, 1121; Er. Exh. 10) Oliver Bell, a consultant hired by the Employer, spoke at the meeting and told employees that the employees in

[11] Virtually all of the employees testified that Wittig encouraged them to call Santa Fe Springs including Max Cervantes, Gordon Quarry, Eric Stevens, and others. Wittig admitted this as well.

southern California voted down the union and then got pay raises. (Tr. 117) According to Max Cervantes, he also told the Stockton employees that a "reasonable man" would assume that Stockton would get the same increase. (Tr. 118) Terrell Ellis also testified regarding this meeting and echoed Cervantes' testimony. (Tr. 174) Ellis' testimony went further and said that employees in Santa Fe Springs were averaging $15 an hour after the increases. (Tr. 175) He also testified that Bell asserted that a "reasonable man" would assume that the Employer would do the same in Stockton if the vote went their way. (Tr. 176-177) Randy Wittig, the Vice President of the Western Region, confirmed at the meeting that what Bell said was correct. (Tr. 177) Randi Graham, the Stockton General Manager, confirmed the testimony that during one of the meetings that Bell said that a reasonable person would assume the Company would do the same thing it did in Santa Fe Springs if the employees voted "no" towards the Union. (Tr. 1577-1578) Finally, the Employer's other witnesses, Kevin Gritsch and Tony Chham, also testified that they were in a meeting where the Employer discussed the raises, and specifically used the figure 12.45%. (Tr. 1607-1609, 1622-1624)

The Employer similarly held meetings in Union City, in early February, about a week prior to the election. The employees testified that Randy Wittig spoke at that meeting, and that he told the employees that they had performed a wage analysis and the Santa Fe Springs employees received, on average, 12.45% increases. (Tr. 1118-1119; Er. Exh. 10) TJ Faumuina, Gordon Quarry, Morgan Crowl, Brandon Marable, and Eric Stevens all testified regarding this meeting and that Randy Wittig specifically told employees that the Santa Fe Springs employees received, on average, 12.45% increases. (Tr. 342-343, 424-425, 494-495, 703-705, 834-836) Wittig did not deny this and admitted that he addressed these wage increases in Santa Fe Springs, included it in a PowerPoint, and told the employees that the same would likely occur in Union City after the election[12]. (Tr. 1118-1126; Er. Exh. 10) Stevens testified that Wittig did not simply provide the information but urged the

[12] The Employer's only witnesses from Union City testified that they did not remember that meeting or discussion, but that is simply not credible. Instead, it is more likely that these employees thought it would hurt the Employer and decided to testify that they did not remember the meeting.

employees to call employees in Santa Fe Springs and verify, to find out what the Company gave them in Santa Fe Springs. (Tr. 834-836)

These pronouncements at both locations certainly had an impact on the bargaining unit and interfered with employees' free choice. Cervantes testified that he talked to employees who were clear "yes" votes prior to the meeting who changed their vote after the meeting, including Rob, Joe Campbell, and Brad King, who specifically referenced money was the reason for his change. (Tr. 41) In fact, King told Cervantes he would get a $2 raise, to $15 per hour, and based on that told Cervantes "let's give the Company another chance." (Tr. 51) Ellis testified that after the meeting employees were chipper. Some took out their phones and calculated what that percentage would mean for them, and that many were satisfied with it. (Tr. 177) Ellis also testified that employees who had previously supported the Union changed their minds after the Employer discussed the wage increases, and that some even began wearing the Employer-supplied anti-union shirts after that meeting. (Tr. 177-179) Ellis testified that once the Employer discussed those figures the level of support for the Union declined. (Tr. 189)

It was not only the Union's witnesses who testified regarding this impact, but the Employer's witnesses did as well. Graham testified that after the meeting regarding the Santa Fe Springs raises that there was a lot of talk about it and that employees were excited about what they had heard. (Tr. 1564-1565) Gritsch testified they he understood that the employees in Santa Fe Springs got a wage increase soon after they rejected the Union and that he and other employees discussed it and all discussed the potential raise. (Tr. 1608-1609) Indeed, he testified that he calculated the percentage with his current wage rate to determine what his new rate would be and believed others did as well. (Tr. 1610) Furthermore, he testified that he and others were all expecting to get the 12.5 percent raise

after the Union was rejected. (Tr. 1610)[13] Tony Chham, another witness introduced by the Employer, said that after the discussion regarding raises in Santa Fe Springs, he and other co-workers talked about how it was obvious that if they gave those raises in Santa Fe Springs that they would also receive them in Stockton, and that he expected an increase if the Union was rejected. (Tr. 1625) He testified that other employees said they agreed with him. (Tr. 1626)

The impact was the same in Union City. Tolopa-Joe (TJ) Faumuina testified that, after the meeting discussing raises in Santa Fe Springs, he believed that if the Union was rejected in Union City the employees there would receive the same raises because "why would anyone else bring up something from another site with a similar situation if the same thing -- if they're saying the same thing is not going to happen there." (Tr. 343) He further testified that he spoke to Brandon, Eric and Mike, who all similarly believed that the Employer was impliedly promising the same increases. (Tr. 343) Gordon Quarry testified that he believed that the Employer promised a raise right off the top, like what had occurred in Santa Fe Springs. (Tr. 424-425) He testified that the Employer told the Union City employees to call Santa Fe Springs to find out what the Employer can do for them. (Tr. 425) He also talked to other employees, including Brandon, Eric, TJ, Donald, and Sergio, who similarly had the impression that if the Union lost then all of the employees would be receiving raises. (Tr. 425-426) Brandon Marable testified that he had the impression that Wittig was telling the employees that if they voted the Union down then they would get the same wage increases as Santa Fe Springs did. (Tr. 706-707) Marable further testified that other employees, including Josh, Joseph (Jo Jo) Lopez, Tim and Sai[14] told him that they would have to reconsider their support for the Union because of what they perceived to be about a $2 raise that was promised. (Tr. 707-709) Marable also heard from the transfer driver that Stockton employees were changing their mind

[13] Gritsch also testified that he and other employees discussed the fact that if the Union was elected that the raises would not immediately happen because the parties would have to negotiate but that if the Union was rejected that the Employer could do what it wanted and immediately provide the raises it discussed. (Tr. 1611)

[14] Tim and Sai were both LKQ salvage drivers. (Tr. 710-711)

because of the discussion regarding wage increases. (Tr. 710) Eric Stevens testified that Wittig told the employees in Union City that they would receive the same increases as Santa Fe Springs right after the election. (Tr. 836-837) Stevens said that he noticed that there was change in others support, including that Mo and Josh changed their minds after the statement about the wage increases. (Tr. 838-839) Stevens also testified that Jo Jo Lopez said after the election that he was waiting for his $2 raise and was upset that he was told that he had to wait until the union stuff is all over with[15]. (Tr. 845) There is certainly no doubt that the employees' took the Employer's statement as an implied promise and it improperly influenced the result of the election.

2. Application of the Facts to the Legal Standard Further Demonstrates the Violation.

This case is much like *G & K Services, Inc.*, 357 NLRB No. 109 (2011). In *G & K Services*, the election at issue was a decertification. A few weeks prior to the vote, the employer sent a letter to employees informing them that a sister facility had recently voted to decertify the same union and that immediately the employees were for the first time able to sign up for health benefits that covered their spouses and children. *Id.* The letter specifically stated that it was not a promise, but that it wanted to provide the employees with information. *Id.* The Board reversed the Hearing Officer and held that the statement in the letter constituted an implied promise, and on that basis alone the Board set aside the election results and ordered a new election. *Id.*

The facts here are very similar, except that it is for an initial representation election as opposed to a decertification election, but that fact is immaterial. Just like in *G & K Services*, the Employer won a representation election shortly before the Union City/Stockton election, announced that fact to the employees, and shortly thereafter announced that the employees in Santa Fe Springs

[15] Lopez testified that he never said this. However, he is being paid $13 per hour, and the $2 increase would get him to $15, which is what the document regarding the Santa Fe Springs raises said. (Er. Exh. 10) Simply, Lopez was not credible and clearly was trying to testify in the way that he thought would best help the Employer's position.

had almost immediately received a wage review and an average of 12.5% wage increases[16]. Like the Board found in *G & K Services*, and as the Board commented in *Zero Corp.*, 262 NLRB 495, 510 (1982), "any reasonably intelligent concerned employee" would view the information provided as a promise that they would receive the same review and wage increases if they rejected the Union. Indeed, as discussed at length above, the employees, including the Employer's own witnesses, viewed this information as a promise.

The Employer will first argue that it made clear to the employees that it was not a promise in the meetings, and that the Employer clearly stated on its PowerPoint slides that it was not making a promise. (Er. Exh. 10) However, that is certainly not dispositive. In *G & K Services*, the employer wrote in its letter to employees that it could not make any promises and the Board held that such a disclaimer is immaterial if an implied promise of benefits has occurred. (*G & K Services*, supra, citing *Michigan Products*, 236 NLRB 1143, 1146 (1978).) The Employer clearly made an implied promise when it stated that a wage review and then increases were made immediately after the employees in Santa Fe Springs voted against the Union; it was certainly implied that the same would occur if the employees in Union City and Stockton voted against the Union. The Employer's statement that it was not a promise was simply a self-serving attempt to try to avoid being charged with an objection. The attempt failed as the employees understood this to be the promise that the Employer clearly intended.

The Employer will also argue that it was simply responding to rumors and questions about what occurred in Southern California, and specifically Santa Fe Springs, and that employers are allowed to provide information in response to questions from employees. However, as in *G & K Services*, there is no direct evidence of specific questions and rumors. Instead, Wittig simply said that he was hearing some crazy rumors and questions and felt that he had to respond, but no further

[16] Some employees who had been working for the Employer for a long time received as much as 25% increases. (Tr. 708, 712)

information such as who asked the questions or who was spreading the rumors was presented. Furthermore, the Employer made a clear posting that the employees in Santa Fe Springs voted down the Union without any questions or rumors, and then held the meeting to discuss the wage reviews and increases soon thereafter. There is not sufficient evidence to prove that the Employer's claim that it was responding to questions or rumors is valid[17]. (See *Coca-Cola Bottling Company of Dubuque*, 325 NLRB 1275, 1276 (1995) (implied promise where employer provided no direct evidence that employees requested the information or no indication "of the occasion on which questions were asked and of whom.))

The Employer will also argue that it was simply providing facts and that the Employer had already decided to implement its wage review program prior to the petition. However, as set forth above, *Crown Tar & Chem. Works v. NLRB*, supra, the court held that a promise of wage increases is objectionable unless the employer had informed the employees prior to the petition. Moreover, the Board has held that if the Employer does not have a concrete plan and a set implementation date then the promise is presumed unlawful. (*Divi Carina Bay Resort*, 356 NLRB No. 60 (2010).) Here, Wittig admitted that the Employer had never told the employees about the plan to conduct a wage review until the meetings in January and February. (Tr. 1117-1118) Furthermore, he also testified that there was no concrete plan, except that in mid-September,[18] right around the time the Employer found out about the Union organizing drive, the Employer decided to implement wage reviews in California, but there were no clear plans on when or how that would be implemented. Therefore, if the Employer argues that it was simply informing the employees of their plans that had been in place

[17] Furthermore, there was no evidence of who was starting the "rumors" that the Employer felt it needed to respond to. The Employer had the information. It is more probable that the Employer initially provided the information that then became the subject of rumors.

[18] Graham testified that she first learned about the Union organizing drive in July 2014. (Tr. 1524-1525) Its difficult to believe that she did not immediately inform her supervisors, thus its likely that the Employer knew about the Union drive well before mid-September.

prior to the Union campaign, the argument fails because there was no concrete plan prior to the petition and the Employer never notified employees of such a plan pre-petition.

The Employer will argue that it did not discuss any set increases in Stockton and Union City, but only that there would be a review. However, this implied promise of a wage review is just the same as an implied promise of wage increases because Wittig admitted that the Employer had never previously performed a comprehensive wage review of all employees in this manner. (Tr. 1123-1124) Therefore, this is a promise of benefits. The Employer told employees that all employees in Santa Fe Springs received wage increases and that a "reasonable person" could assume that there would be similar results in Union City and Stockton. The facts clearly demonstrate that the employees took this as a promise of a wage increases because that is what it was.

Finally, the Employer will argue that this "implied promise" was not predicated on the employees rejecting the Union because it made clear that it would go forward with the reviews regardless of the outcome of the election. (Tr. 1124; Er. Exh. 10) However, in the following presentation slide, it also told the employees that if the Union was elected that it would not be able to implement those reviews and wage increases because it would have to negotiate a contract with the Union. (Tr. 1124-1126; Er. Exh. 10) Throughout the campaign, the Employer had told employees that negotiating a contract could take "weeks, months, or years", with an emphasis on years. (Tr. 560-561; Er. Exh. 10, 11) The Employer only provided examples of lengthy negotiations, including negotiations that took as much as seven years, or even twenty years. (Tr. 561,836) Finally, the Employer repeatedly told the employees that in negotiations wages could go up, stay the same, or even be less. [19] (Er. Exh. 10, 11) The Employer made it clear that without the Union it would implement the increases from the reviews immediately after the election as it had done in Santa Fe

[19] Virtually all witnesses testified to this, including the Employer's witnesses.

Springs. There is no question that this promise was tied to the results of the election and was intended to ensure that the employees rejected the Union.[20]

The evidence is overwhelming that the Employer made an implied promise to employees, under current Board law, of wage reviews and wage increases during the critical period prior to the election. That promise clearly interfered with employees' free choice and therefore the election must be set aside and a new election ordered.

E. The Employer Violated Objection No. 5 and Interfered with Employees' Free Choice by Granting Special Benefits and Promotions to Employees Who Did Not Support the Union.

Conferral of employment benefits during an organizing campaign presumes that such action is objectionable unless "the employer can show that its actions were governed by factors other than the pending election." (*Guard Publ'g Co.*, 344 NLRB 1142 (2005).) A bribe, such as a job promotion, to work against the union has the same effect as a grant of special benefits and is unlawful under the Act. (*Maid in N.Y.*, 289 NLRB 524 (1988) (offer of management position if employee would cease supporting union).)

In the instant case, the Employer conferred benefits on employees during the "critical period" between the filing of the petition and the election. Evidence at hearing was heard regarding two employees who received promotions during the "critical period." There was also evidence regarding Employer benefits given to anti-Union employees by providing food in Stockton only to the Shipping Department, which predominantly was against the Union, and not providing the same benefit to the Receiving and Returns Department, which predominantly supported the Union. Finally, the Employer also gave movie tickets to an anti-union employee during the "critical period."

[20] If this was not related to the election and defeating the Union then it would not have had Oliver Bell, its union-busting consultant, provide the message in the meetings.

1. The Employer Conferred an Unlawful Benefit By Promoting Joseph Lopez.

Joseph "Jo Jo" Lopez is an employee in the Union City facility. Prior to the Union petition, he was a full-time Order Selector working on the Cherry-Picker and selecting orders. (Tr. 405-406, 487-489, 692, 841-842) He worked one hundred percent (100%) in the warehouse. However, in mid-January, during the "critical period", Lopez's job duties changed and he was assigned almost exclusively in the office with Prum. (Tr. 406, 489, 693, 843-844, 1042-1044) Lopez began working on the computer, printing pick tickets for the orders, and directing the other warehouse employees. In fact, while he had only worked in the warehouse since January 2015, he had a desk in the office for his use. (Tr. 693, 843-844, 1042-1044, 1311) Faumuina testified that Lopez told him that he was the Warehouse Manager. (Tr. 401, 405) Crowl testified that he worked side-by-side with Lopez until the change but that in January 2015 Lopez was no longer working with him and instead was giving him orders on what to do. (Tr. 489-491) Crowl, Marable, and Stevens all testified that Lopez began doing the work that Salvador Torres, the previous Warehouse Manager, was doing. The Employer's Regional Manager, Jerry Elwood, testified in agreement with the Union's witnesses, stating that starting in January 2015 Lopez was working mostly in the office, was no longer primarily on the cherry picker, and was directing other warehouse employees, in conjunction with Prum. (Tr. 1041-1044) Furthermore, Antonio Jaime, who also worked in the office, testified that Lopez has a desk in the office that he uses to accomplish his duties. (Tr. 1311)

According to Crowl, Marable, and Stevens, Lopez initially supported the Union, filling out a union card and attending Union meetings. (Tr. 487-488, 693-695, 841-842) Crowl testified that Lopez told him, early on, that he was supporting the Union because he had to support his family and that the Employer had not given him anything. (Tr. 487-488) Lopez hoped the Union would help in that area. Once Lopez' duties changed however, and he was doing supervisory work, his position on the Union changed as well. (Tr. 488, 694-695, 841-843) Around the time of the election Lopez wore a "vote no" shirt and told Stevens and other employees that he was no longer for the Union because

he was promised the Warehouse Manager position and needed the money. (Tr.488, 694-695, 841-845)

Importantly, Lopez is now doing the same duties that Harvey Nelson does as Warehouse Lead in Stockton. Lopez prints tickets, works in the office, and directs the work. Like Nelson, Lopez does work in the warehouse at times, but not all the time as he used to. At the previous hearing regarding the appropriateness of the unit, the Employer asserted that Nelson is a Section 2(11) supervisor. Since Lopez is doing the same duties as Nelson, he would also be a 2(11) supervisor, which would certainly be a promotion from his previous job as an Order Selector. The other employees in the bargaining unit saw Lopez's duties change drastically, and heard him tell employees that he was going to be the Warehouse Manager. The employees, as many testified, certainly understood and got the message that Lopez was promised the promotion and the better duties in exchange for being against the Union. Lopez's promotion to a supervisory position during the critical period is objectionable conduct and sufficient to set-aside the election because it disrupts the "laboratory conditions."

The Employer will argue that Lopez was not officially promoted, no promotion was announced, and Lopez did not get any additional wages. That may be true because the Company knows that it cannot confer such a benefit during the critical period. However, Prum and Lopez both testified that there were no changes in Lopez's duties and that he is essentially doing the same job that he had previously done. Other than Prum and Lopez' testimony, which is clearly intended to deflect any objectionable conduct, the evidence cannot support this testimony. Four (4) hourly employees in the warehouse testified regarding Lopez' change of duties and said that he was performing Torres' previous role. The Employer provided no explanation why these witnesses would not testify truthfully about Lopez. It defies common sense to conclude, without any foundation, that all of these employees would make this up. More importantly, there is a foundation that supports their testimony that came from the Employer's own witnesses, Elwood and Jaime. They both

testified that there was a change in Lopez's duties, and that Lopez was, essentially, performing a similar role as Torres did when he was Warehouse Manager[21]. (Tr. 1041-1044, 1311-1312) Since Lopez went from being an Order Selector to doing the job of the Warehouse Manager, he either received or was promised a promotion.

The clear promotion and change of duties to a higher position, coinciding with Lopez's abrupt change of sentiment regarding the Union, demonstrates that he was promised a promotion during the critical period and certainly sends that message to the majority of employees.

The Employer may argue that it needed to have someone fill in that role when Torres abruptly resigned his position. However, the Employer brought Chuck Brown, a warehouse lead from Santa Fe Springs, to the Union City facility to, according to Elwood, help keep the warehouse going and perform some of Torres' duties. If that was the case, it had no need to alter Lopez' duties and give him a promotion during the critical period. In actuality, Brown did not perform Lopez' duties but instead was simply used by the Employer to spy on pro-Union employees. (Tr. 501, 507-509, 564-565)

2. The Employer Conferred an Unlawful Benefit By Promoting Antonio Jaime.

Antonio "Tony" Jaime is another employee who was granted a promotion during the "critical period." Prior to the Union petition, Jaime was a full-fledged driver. He was assigned a route and worked one hundred percent (100 %) of the time as a driver. However, after the petition, and around January 2015, Jaime was moved into the office as Dispatcher. (Tr. 1296-1298) He began working almost exclusively in the office, serving as a relief driver on the rare occasion, but generally working on the computer manifesting routes, telling employees what routes to perform, and dealing with issues that arise when drivers are in the field. (Tr. 1296-1300) Faumuina testified that when Jaime's duties changed, he was given a new route every day, and that it was Jaime who told him what route to

[21] Jaime testified that he was still in training for the Warehouse Manager position. (Tr. 1311-1312) But, he would only be training if he was in fact promised the position.

do each day. (Tr. 400) Faumuina also testified that Jaime told him, around January 2015, that he was a supervisor. (Tr. 391-392) Other employees testified that Jaime's duties clearly changed, as he went from being on the road every day to being in the office almost all day every day. (Tr. 697-698, 844-849) In fact, Elwood also testified that Jaime's duties changed and that he was, as of November, doing more office and dispatch duties and not driving. (Tr. 1062-1066)[22]

These new duties qualified Jaime a supervisor/manager under the Employer's classifications. Indeed, Jaime is now doing similar duties that Bellido was doing in Stockton when he was classified as the Dispatch Supervisor. Bellido was unquestionably a management employee. Furthermore, Elwood testified that Jaime was doing jobs similar to what Priscilla Cobb had previously done as the Production Manager, again clearly a management/supervisory employee. (Tr. 1062-1066) Jaime's new responsibilities plainly constituted a promotion from his job as a driver.

Again, like Lopez, around the same time that Jaime got assigned new duties and told the employees that he was now a supervisor, his position regarding the Union changed. Other employees testified that he was initially in favor of the Union, and Jaime did not deny it at hearing. (Tr. 847-848, 1313) But, after his position changed he told some employees that he no longer supported the Union because of his new job. (Tr. 392, 697-699, 847-848) According to some employees Jaime was also seen wearing a "vote no" shirt. (Tr. 847-848)

The Employer will argue that, like Lopez, Jaime was not given a promotion or a wage increase. Again, like Lopez, had it included a wage increase it would be easily demonstrated that the Employer conferred a benefit on an employee in the form of a promotion. But, like Lopez, Jaime and Prum's testimony does not match that of the Regional Manager, Elwood, who testified that Jaime received a change in duties and is no longer driving on a regular basis. (Tr. 1062-1066) This change

[22] The Employer's witness Christian Garcia testified that he understood why employees believed that Jaime received a promotion in exchange for opposing the Union because f his sudden change in duties. (Tr. 1281-1282)

of duties indicates that Jaime is now doing management level work, and therefore, was promoted during the "critical period."

3. The Employer Conferred an Unlawful Benefit By Regularly Providing Food to the Shipping Department.

In the Stockton facility, the Employer provided food to the Shipping Department, which was almost unanimously opposing the Union. Cervantes and Ellis both testified that the supervisors had never previously brought in food for employees prior to the Union petition. (Tr.31-34, 169-171) However, once the petition was filed, Bellido was re-assigned to supervise the Shipping Department and he began regularly bringing food for the Shipping employees. The food included pizza, burritos, Olive Garden, Starbucks coffee, and others. It was well-known to the employees in the warehouse that the Shipping Department was anti-union because those employees made it clear by wearing "vote no" pins and "vote no" t-shirts. When Bellido brought food in, as Graham testified, it was likely brought to the office, not the break room, and the employees ate in the office. On one occasion, Ellis and another Receiving employee went to the office and asked if they could have some pizza. An employee slammed the lid of the pizza box down and said that management provided it, and that the pizza was only for Shipping and not for anyone else. (Tr. 169-171)

Cervantes and Ellis both testified that the other employees understood that Bellido was bringing in food for Shipping because they were against the Union and that the other departments did not get food because they generally supported the Union. Byron Manabe is the supervisor for the Receiving Department and the Returns Department. Both Manabe and Graham testified that Manabe never brought food for those employees. (Tr. 1575, 1639)Instead, Manabe gave a gift card to one of the few employees in his department who did not support the Union, as discussed below.

Giving food to only the Shipping Department conferred an unlawful benefit on the Shipping employees who were against the Union, as it divided the workplace and sent the message to all of the warehouse employees that if you don't support the Union you will be treated better and be given

certain benefits. This information was widely disseminated, as all of the warehouse employees saw what was occurring. Therefore, although the Employer may try to argue that the benefit was minor and de minimis, the impact it had on the workplace was not inconsequential because the employees quickly recognized that those who did no support the Union got a special benefit.

The Employer will also likely argue that Bellido's decision to bring food for his department had nothing to do with the Union, but that it was something Bellido did for his employees. That is a convenient explanation, but there is no evidence that Bellido brought food for his employees prior to the election. The Employer did not put on testimony from any non-management employees about this conferral of benefits, despite having Stockton hourly employees testify who conceivably could have confirmed Bellido and Graham's explanation. The Employer never questioned these witnesses about Bellido bringing food to work which should give rise to an inference that the employees would not have conferred with Bellido and Graham's testimony.

4. The Employer Conferred an Unlawful Benefit By Giving a Gift Card to Justin Rivas.

The final allegation of improper conferral of benefits on employees for not supporting the Union is when the Employer gave two (2) free movie tickets to Justin Rivas, a Receiving employee who opposed the Union. Cervantes testified that Rivas clearly opposed the Union, which included wearing a 'Vote No' pin at work, and wearing a 'Vote No' t-shirt. (Tr. 35-37) Graham testified that she also knew that Rivas was anti-union. (Tr. 1540) Around January, 2015, Graham and Manabe gave Rivas a gift card. (Tr. 1474). Rivas immediately went to the pro-Union employees bragging about what the Employer gave him. (Tr. 35-37) Cervantes and other employees believed that the Employer gave Rivas these tickets because of his stance regarding the Union.

The Employer, however, will assert that it gave Rivas the gift card because he had been working extra hours, was doing good work, and they wanted to recognize him for it. However, Rivas was not the only employee who was working extra hours or doing exemplary work, yet he was the only employee who received this benefit. Cervantes testified that he did not know of any other times

when Graham or anyone in management would have given such a gift card to employees. (Tr. 35-37) Furthermore, Cervantes testified that during the same period he was essentially working alone because Stephen Dixon, the other employee in the Returns Department, was on a leave of absence. (Tr.95-96) Therefore, for almost six (6) months, Cervantes was doing the work of two (2) people by himself, but the Employer did not give him a gift card like it did Rivas. (Tr. 95-96)

This benefit to Rivas, which had not been given previously to others, was likely intended to reward him for his stance regarding the Union. This harmed the "laboratory conditions" because the other employees saw that the Employer treated those who were against the Union different by giving them special benefits. This conduct interfered with employees' free choice to elect their bargaining unit representative.

F. The Employer Violated Objection Nos. 6 and 11 and Interfered with Employees' Free Choice By Making Threats of the Loss of Certain Benefits and Conditions of Employment.

It is well understood that it is unlawful for an employer to issue views about a union that contains a threat of reprisal. (*See Gissel Packing Co.,* 395 U.S. 575 (1969).) The Board's test is to consider whether a remark can reasonably be interpreted by the employee as a threat. (*See Smithers Tire*, 308 NLRB 72 (1992), *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 fn.2 (1999).) In *NLRB v. Electric Co.,* 438 F.2d 1102 (9th Cir. 1971), the court held that "an employer may not impliedly threaten retaliatory consequences within his control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact." Conduct that would be an 8(a)(1) violation can also be the subject of an objection because it would interfere with the exercise of a free and untrammeled choice in an election." (*Playskool Mfg. Co.,* 140 NLRB 1417 (1963).) The test is an objective one as to whether the conduct has a tendency to interfere with employee free choice. (*See Hopkins Nursing Care Center,* 309 NLRB 958 (1992).)

In the instant case the Employer made two threats in Stockton regarding taking away certain benefits. The Employer's witnesses attested to these comments and these threats would certainly have a tendency to interfere with employee free choice.

1. The Employer Made an Unlawful Threat to Discontinue the CORE Program if the Union Were Elected.

Core is a program through which drivers can obtain scrap bumpers from customers and bring them back to the facility where the Employer repairs them and redistributes them. (Tr. 186) Drivers receive one dollar per bumper. (Tr. 186) Employees can make up to four or five hundred dollars in a two-week pay period from this program. (Tr. 186) Around October 2014, during the "critical period," Rolando Bellido told Ellis and one other employee that there was a good possibility, and that it was "more than likely", that the employer would no longer offer the CORE program. (Tr. 186-187, 279-281) Ellis told other employees about the Core program, and some employees, such as another driver Alphonso, were very upset. (Tr. 187) According to Ellis, Alphonso is one of the biggest beneficiaries of the Core program, and that if the program went away it would be very bad for him because the Core program is a big part of his income. (Tr. 187) Bellido admitted that he told drivers the Employer would be able to take away the Core program if it wanted to. (Tr. 1433) Bellido testified that Alfonso and Brad King talked to him about it and that King got upset because he thought the Core program would go away. (Tr. 1438-1439)

For the drivers in Stockton, who constitute 15 of the employees in the bargaining unit, the Core program is important because some of the employees make significant additional income through the program. Therefore, this threat by Bellido, and the subsequent dissemination of the threat certainly had an impact on the employees and interfered with a free election. This is particularly true given that Bellido had no basis to make the statements he made about the Core program.

The Employer may argue that Bellido did not make the statement that the Core program would likely go away, because Bellido denied making the statement. (Tr. 1392-1393) However, there is no dispute that there was discussion around the facility that the Core program would go away, and that employees discussed the issue with Bellido. (Tr. 1432-1433) Therefore, to accept the Employer's argument that Bellido never made the statements about the CORE program, the Hearing Officer would have to believe that Ellis completely made up the fact that Bellido made this statement and told other employees. That would not make any sense because Ellis was in favor of the Union, and this threat regarding the Core program had the potential to cause Stockton drivers, a significant percentage of the bargaining unit, to vote against the Union. Furthermore, Bellido's testimony was vague and he refused to directly answer specific questions on cross-examination regarding this issue. It was apparent from his testimony that he was not being fully honest and tried to hide the fact that he made this threat.

Bellido, an agent of the Employer threatened that the Employer would "more than likely" take away the Core program if the Union "infiltrated" the Employer. This threat, from an objective perspective, would certainly tend to interfere with employee free choice because many of the drivers in Stockton relied on the Core program for extra income.

2. <u>The Employer Made an Unlawful Threat That It Would Be Less Flexible If It Voted for the Union.</u>

In addition to the unlawful threat of taking away the Core program, the Stockton management also threatened to take away other "perks" such as the flexibility to be a few minutes late, taking time to participate in kids' school activities, and other "gray" areas. Cervantes testified that soon after the petition, Graham had him, Ellis, and possibly a few other employees into her office and told them that she was taking the Union petition very personally. She was clearly upset and angry, and told the

employees that because of the Union they would lose the "perks" and flexibility she gives them[23]. (Tr. 44-46) Ellis testified that he spoke to Graham on several occasions when he told her that he supported the Union, and Graham told him that supervisory "laxness", such as employees getting off early or altering work schedules for children's school functions, would no longer occur. (Tr. 185-186) Ellis testified that Graham made these statements in front of several other employees. (Tr. 185-186)

The Employer's witnesses did not dispute this. Bellido testified that he heard Graham tell employees that she was taking the Union petition very personally and that the employees could lose flexibility and certain benefits. (Tr. 1411-1412) Graham also admitted that she told Ellis that the "gray" areas would go away, and that things that had previously been gray areas would no longer be gray if there was a contract. (Tr. 1535-1537) Conveniently, she could not remember the details of what she and Ellis spoke about. (Tr. 1536-1537) Furthermore, Gritsch testified that in meetings Graham said that if the Union came in there would no longer be 'gray areas', and that he understood this meant no more flexibility regarding things like being a few minutes late for work. (Tr. 1605)

The Employer's own witnesses generally corroborated Ellis and Cervantes' testimony. However, the details that Cervantes and Ellis testified about are more believable because of the credibility issues already discussed above. Furthermore, Ellis and Cervantes testified to specific details about incidents where Bellido and Graham often responded to direct questions by stating that they could not recall, which indicates they were evading the issue.

In *Olympic Supply d/b/a Onsite News*, 359 NLRB No. 99 (2013), the Board held that threats of stricter enforcement of work rules for supporting the Union is a violation of section 8(a)(1) and is objectionable. The Board upheld the ALJ's decision to set-aside the election because the conduct of threatening stricter enforcement of rules destroyed the laboratory conditions during the critical

[23] The Employer may assert that it never had a flexible policy regarding being a few minutes late and will highlight it by pointing out that Cervantes admitted to receiving a verbal warning for being late. (Tr. 69-71) However, as Cervantes testified, that was an occasion where he was several hours late, which is very different from being just a few minutes late. (Tr. 69-71) Cervantes further testified that he did not know of any employees who were disciplined for being three minutes late. (Tr. 71)

period. (*See Id*, slip op. at p. 8.) Similarly, in *Miller Industries Towing Equipment Inc.*, 355 NLRB 1074 (2004), the Board upheld the ALJ's decision to set-aside the election results when the employer threatened stricter enforcement of break and lunch rules if the union was elected.

The instant case is very similar to the above-cases. The Employer threatened that if the Union were elected that it would be more rigid in its enforcement of workplace rules. The Employer did not place any limitations on the threat or statements, which indicated that this was a credible threat. Indeed, Ellis testified that Graham told him that there would be less flexibility regarding taking time to attend school functions. The Employer may argue that these limitations would be required by the contract, but that is simply untrue because state law requires employers to provide time off for employees to participate in school activities. (*See Cal. Labor Code §230.8.*) Therefore, the statements made by Graham and others were not mere predictions but threats of stricter enforcement of work rules, which violates the Act.

The testimony established that the Employer made these types of statements to several people. Indeed, Graham admitted that she might have had these conversations with many people. Therefore, there was sufficient dissemination of the threats to destroy the laboratory condition and interfere with the election.

G. The Employer Violated Objection Nos. 16, and 17 and Interfered with Employees' Free Choice By Comments Made About What Would Occur in Bargaining If the Union Were to Win the Election and By Making Threats of the Loss of Certain Benefits and Conditions of Employment.

It is generally unlawful for the employer to send the message to employees that the selection of a union would be an "exercise in futility." (*Overnite Transp. Co.*, 296 NLRB 669, 671 (1989).) Conveyance of a sense of futility sufficient to warrant setting aside an election ordinarily requires that the employer have stated "either expressly, or by clear implication, that it would not bargain in good faith with a union even if it were selected by the employees." (*American Greetings Corp.*, 146 NLRB 1440, 1145 n.4 (1963); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1783 (1962) (unlawful statement by

the employer that the election process "will not mean a thing if the union wins" because the employer would take a "couple of years" to litigate it).

Here, the Employer, primarily through Bob Alberico, repeatedly made statements to employees that indicated and implied that choosing the union would be futile. Alberico and Oliver Bell consistently told the employees that it was not required to come to any agreement, but simply had to bargain in "good faith." (Tr. 559, 594; Er. Exh. 11) One employee testified that when the Employer's representative stated they had to bargain in "good faith" he snickered, indicating that they would not do so. (Tr. 559, 594) In fact, the Company put up postings informing the employees that it did not have to come to an agreement. (Er. Exh. 9) While legally this may be true in the bargaining context, there was no reason to provide this information during the campaign, except to make the implied threat that the Employer would not actually come to an agreement with the Union. Furthermore, Ellis testified Wittig told employees that the Employer would reject the first proposal without considering it. (Tr. 179-180)

Moreover, the Employer repeatedly told employees that bargaining could take a very long time. (Tr. 125, 127-128) The Employer harped on the fact that bargaining could take weeks, months, or years, and that it could not predict how long it would take. (Tr. 125, 127-128, 712) However, the Union's witnesses, which was corroborated by the Employer's witnesses, testified that the emphasis was always on the fact that it could take a long time. (Tr. 560-561) This included the use of examples of situations where it took over seven (7) years for a union to negotiate a contract, and even example where it took twenty (20) years. (Tr. 560-561) Again, the Employer was clearly implying that negotiations would drag on and take a long time. This threat and statement of futility was further enhanced by the fact that the Employer contrasted the length of negotiating with how quick employees in Santa Fe Springs received wage increases after rejecting the Union, and the implied promise that it would implement reviews and raises soon after the election if the Union was rejected. (Tr.1124-1126; Er. Exh. 10)

Finally, the Employer made it clear to the employees that in bargaining, everything starts at zero, or "starting at the bottom tier" as the Employer's witness Gritsch testified. (Tr. 126-127, 1591) Numerous employees testified that the Employer told the employees that things could get better, stay the same, or get worse. The employees understood these statements as threats because if they negotiated a contract their conditions of employment could conceivably get worse, and even if conditions of employment eventually improved, it would take a very long time.

These statements, combined with all of the other objectionable conduct discussed herein, shows that the Employer unlawfully implied that bargaining would be futile and useless and that employees would get better benefits sooner if they rejected the Union. For these reasons, the Employer's conduct was objectionable and is cause for setting aside the election.

H. The Employer Violated Objection No. 7 and Interfered with Employees' Free Choice by Implying that the Employees' Protected Union Activities Were Under Surveillance By the Employer.

An employer violates Section 8(a)(1) if it creates the impression among employees that it is engaged in surveillance. (*Promedica Health Sys., Inc.*, 343 NLRB 1351 (2004).) Statements made by a manager to an employee regarding the employee's union involvement that imply the manager is watching the employee are unlawful. (*See e.g. Golden State Foods Corp.*, 340 NLRB 381 (2003) (supervisor's comment that "eyes are on you and you need to watch your step" to pro-union employee created impression of surveillance and violated the Act).) The employer's conduct is evaluated from the perspective of the employee and is unlawful if the employee would reasonably conclude that employees' protected activities were being monitored. (*Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center,* 332 NLRB at 1540; *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999).)

In this case, the Employer's managers and agents made comments to employees regarding surveillance cameras in the workplace, which reinforced the belief that the employees were being watched. Furthermore, the Employer's management dramatically increased the amount of time it

spent watching employees in the warehouse, particularly pro-Union employees. The Employer made this apparent to these pro-Union employees by making comments to them almost any time they were talking to other employees, even if only for a brief moment, thus giving the employees the reasonable impression that their activities were being surveilled.

1. The Employer Informed Employees That They Were Being Watched and/or Listened to by Cameras.

a. Salvador Torres and Priscilla Cobb Told Eric Stevens That the Video Cameras Had Microphones and That Management Could Listen to What Was Said.

Eric Stevens testified that there are twelve to fifteen cameras in the break room and other places around the warehouse and that there were rumors throughout his time working in Union City that the cameras had microphones. (Tr. 853, 901) Stevens testified that Salvador Torres, the former Warehouse Manager, told him while Torres was still a management employee that the microphones worked and that management could listen to the employees. (Tr. 854-855, 893-900) Stevens talked to Torres twice about the cameras. The first time he did no tell Stevens much, but the second time, in January, before Torres left, he told Stevens, "they really do work." (Tr. 857-858) Priscilla Cobb, the former Production Manager for the Employer, also told Stevens that management can listen in on the microphones. (Tr. 855-856) Cobb told him this in the middle of January while she was still a management employee. (Tr. 855-856)

This conduct is an 8(a)(1) violation and objectionable because the Employer gave the impression of surveillance and the employee understood the statements to mean that the Employer was listening to the employees. Torres and Cobb were both managers when they made the statements, and therefore, agents of the Employer. The Employer will argue that Torres and Cobb, when giving this information to Stevens, were not acting as agents of the Employer because they

were not furthering the interests of the Employer[24]. However, that is not the test. These employees were management level employees that directed other employees. The Employer held them out as agents of the Employer in all respects. The Employer cannot now disclaim their statements simply because they do not like what its management employees admitted to.

The Employer will also likely argue that the statements made were not true. The Employer will point to Elwood's testimony that the cameras' microphones do not record. (Tr. 1000) However, that is not the statement at issue - the statements from Torres and Cobb were that the microphones worked, it did not specifically state that the cameras record. Elwood testified that he did not know whether the microphones work or not. (Tr. 1041) Furthermore, the Employer had other management witnesses, after the fact, such as Prum and Wittig, who could have testified regarding whether there are working microphones that pick up audio in the cameras and it did not do so. The Employer had the opportunity to subpoena and question Torres and Cobb[25] and it did not do so. Therefore, there should be an inference that the testimony is correct because it made scant effort to rebut the testimony.

Finally, as set forth above, the key issue is whether a reasonable person would believe they were being surveilled based on comments from management. Stevens believed he was being surveilled by the Employer, and his belief was reasonable given his explanation of seeing lights going on and off on the cameras and the statements from two of the key managers at the facility that the microphones on the cameras transmitted audio. (Tr. 898-900) It can be readily assumed that other employees had the same reasonable impression.

[24] The Employer will also argue that the statements are hearsay. However, these statements are not hearsay because they fall into the 'Admission of a Party Opponent' exception to the hearsay rule because Torres and Cobb were both managers at the time the statements were made.

[25] The Employer is in the best position to subpoena Torres and Cobb because they were management employees and the Employer would likely have their contact information.

b. Rolando Bellido Confirmed to Kenneth Wright and Max Cervantes That Video Cameras Were Surveilling Employees Protected Activity.

Rolando Bellido also made comments that gave the impression that the Employer was recording employees' conduct. Cervantes testified that Bellido told Ellis that he caught Cervantes on video handing out Union flyers. (Tr. 20, 102-103) Around the same time, Bellido told Ellis that he saw him getting a Union card from Will Norton and therefore knew that he was part of the Union organizing drive. (Tr. 140-141) Bellido also testified specifically to making statements that would certainly give employees the impression of being surveilled. At one point in September, Bellido asked Cervantes about missing scrap metal and Cervantes asked if he could look at the video recordings. Bellido confirmed that they could look at the video recordings from the cameras because there are video recordings of the whole warehouse. (Tr. 1372, 1423-1424) Bellido also testified that Kenny Wright was joking with another employee, Javier Arias, about stealing and Bellido said, "Its your own discretion, but there are cameras." (Tr. 1372-1373) This statement occurred during the "critical period" because Bellido knew that it was when he was overseeing the Shipping department, and that was after the petition was filed. (Tr. 1423)

These are instances where the Employer's manager made statements to employees that would give them the impression that their activities were being surveilled. Bellido admitted making these comments himself. Again, the issue is whether employees would reasonably understand these comments to mean that they were being surveilled in their activities, and any reasonable employee who heard these comments would certainly believe that they were being surveilled. Therefore, this is also objectionable conduct.

c. Rolando Bellido Pointed a Camera at Max Cervantes as if He Was Taking Pictures or Recording Him.

Cervantes testified that there were occasions when he was talking to employees in the warehouse and Bellido walked by and put his phone up, either giving Cervantes the impression that Bellido was taking a picture or recording him. (Tr. 23) Bellido admitted that he always had his

phone with him when he was walking around the warehouse and that he would often be looking at emails and would take pictures of parts. (Tr. 1424-1425) Therefore, Bellido would have had his camera with him. Cervantes testimony is credible that Bellido pointed the camera towards him, and whether he took a picture or not, he gave Cervantes the impression that he was photographing him, which by itself is a violation of the Act. As discussed above, Cervantes' testimony is more credible than Bellido's, and this alleged conduct by Bellido was consistent with the statements he admitted making about video cameras, as well as his overall conduct of harassing Cervantes whenever he spoke to any employee. For these reasons, this is another incident of the Employer's unlawful conduct giving the impression of surveillance.

2. The Employer Increased Its Presence in the Warehouse and Gave the Impression That It was Surveilling Employees Protected Activity.

The Employer also gave the impression that it was surveilling employees through the increased presence of supervisors and managers in the warehouse during the "critical period," particularly in the work areas of known Union supporters and in areas where they were not typically seen prior to the petition.

a. The Employer Gave the Impression of Surveilling the Stockton Warehouse Employees During the Critical Period.

In Stockton, Cervantes testified that prior to the petition managers never came to his Returns Department area to watch his work. (Tr. 22) However, after the petition was filed he saw Graham, Bellido, and Manabe "sneaking out of nowhere" or "popping out of nowhere' to check on what he was doing. (Tr. 22-23) Cervantes testified that after the petition was filed, and after it was clear that he was pro-Union, that he would see managers pop up on a daily basis. (Tr. 22-24) He even testified that he saw managers looking around his desk to see what he had. (Tr. 23) On another occasion, he testified that he was working and looked up and Graham was simply staring at him with a mean look on her face, and then just kept staring him down while walking away. (Tr. 24-25) Cervantes further

testified that if he was talking to other employees briefly during the critical period, that a manager would pop up and ask him if he had something to do, or tell him to get back to work. (Tr. 106-107)

Ellis testified that management was around much more during the "critical period" and would always pop up anytime that he was talking to someone and tell him to get back to work. (Tr. 159) Ellis also said that on almost a daily basis that Bellido or Graham would interrupt him on his break and ask him if he was on break. (Tr. 157-159, 240-244) He testified that Manabe would watch him while he was on break and make sure that he did not go over his allotted break time, and would single him out if he went over, even though other employees were on break at the same time. (Tr. 156) Ellis also testified that after the petition was filed that management was in his work area much more frequently than prior to the petition. (Tr. 160) He testified that whenever he finished one task management would come around the corner within a minute to give him another task or ask why he was not doing anything. (Tr. 159-160) Ellis testified that if he was talking for even a brief moment that a management employee would "shoo" him away or ask him to get back to work, which had never occurred prior to the petition[26]. (Tr. 150-152, 300-301) In addition, Ellis testified that after the petition was filed, if they saw him talking to other employees management would come and ask him what he was talking about. (Tr. 303-304)

The Employer may argue that it was not surveilling the employees but instead simply supervising the employees, as is their right. However, Graham testified herself that she was in the warehouse walking around and watching things much more frequently after the petition was filed. (Tr. 1529-1530) While the Employer may assert it had the right to monitor its warehouse, the way it did so during the "critical period" certainly gave the impression of surveillance. Management would "sneak up" or "pop up" out of corners, or just walk slowly observing certain pro-Union employees.

[26] Ellis also testified that other employees would have conversations during the "critical period" and nobody ever said anything to them, including instances of talking and laughing with supervisors. (Tr. 301-302)

As Cervantes and Ellis testified, it gave them the impression that they were being surveilled. Given the facts presented at hearing, this was a reasonable impression to have.

3. The Employer Gave the Impression of Surveilling the Union City Warehouse Employees During the Critical Period.

The Employer did not only engage in unlawful surveillance in Stockton but also in Union City. Several employees testified regarding the increased presence of management in the Union City facility. Morgan Crowl, a former temporary employee, testified that he noticed that close to the election management was more frequently present in the container area and returns areas of the warehouse. (Tr. 500-501) He also testified that Chuck Brown, a manager from Santa Fe Springs was brought in to work in the warehouse. Crowl testified that Brown did not have any set job but appeared to hang around and listen and talk to people. (Tr. 501) He further testified that Brown would walk back and forth ever fifteen (15) minutes between Returns and Production, where Anthony, a pro-Union employee was working, to check on things. (Tr. 508-509) This is consistent with Elwood's testimony that Brown did not have set duties in Union City but was just there to "assist." (Tr. 1044) Crowl also testified that another temporary employee, Manny, would hang around employees while they were on break, watching and listening to them, and then would be seen soon after talking to management in the office[27]. (Tr. 501-502)

Brandon Marable, a driver who was moved to the warehouse in January, also testified regarding surveillance. Marable was a strong Union supporter, which the Employer knew because he had told Prum. (Tr. 682-683) Marable testified that Jo Jo Lopez would come out and tell him to stop talking to people whenever he was talking to employees for just a second. (Tr. 691) Marable testified that Lopez told him that Prum would send him to the warehouse to talk to Marable about not talking to others. (Tr. 691)

[27] Crowl testified that other employees, including drivers, noticed this level of surveillance and discussed it. (Tr. 502-503)

Eric Stevens, a driver who was moved to the warehouse at the very beginning of the Union campaign, also testified regarding surveillance in the warehouse. Stevens testified that during the "critical period" management employees, particularly Prum and Elwood, would walk around the back aisles and look through the racks to see what employees were doing and/or talking about. (Tr. 860) Stevens further testified that it would not have been common for Prum and Elwood to be seen around the aisles in the warehouse prior to the petition. (Tr. 860-861)

Again, this evidence demonstrates that the Employer increased its presence in the warehouse by walking around and closely watching the employees, which gave the impression that they were surveilling the employees. Several employees in both facilities testified regarding a feeling of surveillance, and that other employees discussed it with them as well. This conduct violates section 8(a)(1) and is objectionable and therefore is grounds for setting aside the election.

I. The Employer Violated Objection No. 8 and Interfered with Employees' Free Choice by Doing Ride-Alongs with the Employees and Specifically By Implementing the Ride-Alongs in a Coercive Manner.

The Regional Director initially overruled the Union's objection alleging that the Employer's use of ride-alongs during the critical period was coercive and therefore objectionable. The Union filed an exception to the Regional Director's ruling and the Board remanded the objection to the Region to consider at hearing. The Board held that the Union's exceptions raised substantial and material issues of fact that can best be resolved at hearing. (Bd. Exh. 3) The Hearing Officer ruled that the scope of the objections to be litigated was based on the Union's Brief in Support of its Exceptions. (Jt. Exh. 2)

It is true the Board has held that ride-alongs are not objectionable absent coercion. See *Noah's New York Bagels*, 324 NLRB 266 (1997). Indeed, in *Frito Lay, Inc.* , 341 NLRB 515 (2004), the Board majority declined to adopt a bright-line rule prohibiting campaign ride-alongs altogether and continued to hold that ride-alongs are not *per se* objectionable, but may be objectionable when they are coercive. In *Frito Lay*, the Board enumerated the factors to be considered in determining whether ride-alongs are coercive. These factors are:

> (1)Whether the use and conduct of ride-alongs is reasonably tailored to meet the employer's need to communicate with its employees in light of the availability and effectiveness of alternative means of communications; (2) the atmosphere prevalent during the ride-alongs and the tenor of the conversation between the drivers and the employer's representatives; (3) whether the employer effectively permitted the employees to decline ride-alongs; (4) the frequency of the ride-alongs, both during and prior to the election campaign; (5) the positions held by the ride-along guests; (6) whether the ride-alongs were scheduled in a discriminatory manner; and (7) whether the ride-alongs took place in a context otherwise free of objectionable conduct. *Id.* at 516-517.

In *Frito-Lay*, the Board analyzed the evidence presented at hearing and determined that the ride-alongs were not coercive because ride-alongs were common prior to the election campaign and drivers were not scheduled for excessive ride-alongs. *Id.*

However, the facts in this case are much different and an in-depth analysis of the *Frito-Lay* factors shows that the ride-alongs enforced by Keystone were inherently coercive and therefore objectionable. Indeed, given that drivers make up at least half of the bargaining unit, the coercive nature of these ride-alongs clearly interfered with employees' free choice and disrupted the election sufficient enough to require that the election be set aside.[28]

1. The Employer Had Alternative Means of Communication With the Employees.

The first factor is whether the use and conduct of ride-alongs is reasonably tailored to meet the employer's need to communicate with its employees in light of the availability and effectiveness of alternative means of communication. In this case, it certainly is not. The Employer had several alternative means of communication that it used, and several that it did not.

First, as all employees testified and is not in dispute, the Employer had meetings with employees at least once or twice per week for most of the critical period between the filing of the petition and the election. The Union's witnesses testified to this, as did the Employer's witnesses. The Employer had at least eight (8) lengthy meetings to discuss issues such as collective bargaining, to show videos about the Teamsters, and to discuss wage increases at Santa Fe Springs and make

[28] While the Union understands that *Frito-Lay* is currently controlling, it also asserts that the Board should make a bright-line rule prohibiting campaign-related ride-alongs. Ride-alongs are used to demonstrate an employer's authority over drivers, and places them in close confinement with supervisors alone for many hours. The current approach allows coercion, sometimes subtle, but real, to often go undetected and unremedied. Therefore, a *per se* rule as outlined by Member Liebman in her dissent in *Frito-Lay*, 341 NLRB No. 65, slip op. at pp. 6-7, is the approach the Board should adopt. Indeed, ride-alongs are similar to employer home visits that have long been outlawed. Regardless, even under the Board's *Frito-Lay* factors it is clear that the Employer's ride-along program was coercive and therefore objectionable.

implied promises regarding wage increases in Union City and Stockton. (Tr. 1077-1078, 1110) In addition to these meetings, the Employer also regularly met with employees to read postings about the Union and to give the employees the opportunity to ask questions. (Tr. 1077-1078; 1109-1110; Er. Exh. 9) The Employer posted informational postings about the Union on an almost daily basis communicating its feelings regarding the Union, typically punctuated by asking for a 'No' vote. (Er. Exh. 9) Finally, the Employer sent at least four (4) pieces of mail to the employees' homes. (Tr. 1107-1108; Er. Exh. 8) The Employer had significant opportunities to meet with employees and communicate with them, and regularly did so, without the need to force ride-alongs on employees.

The Employer will assert that drivers complained about the morning meetings because it delayed the start of their day and therefore that they implemented ride-alongs to address this concern. The Union witnesses agreed that there were some complaints. However, the Employer had other means available to communicate with employees without forcing managers to ride in their trucks for five to ten hours[29]. The drivers are at the facilities between one to two hours each morning to prepare for their routes, are at the facility for another hour prior to their second run, if they are doing one, and return to the facility for another thirty to forty-five minutes after they finish their routes for the day and are preparing their paperwork. (Tr. 777-779) The managers are present during this time and therefore have many opportunities to go and talk to an employee one-on-one or to ask them in the office to see if they have any questions about the postings. (Tr.777-779, 1531-1532, 1580-1582) Indeed, the Union's witnesses testified that there are many opportunities during these time periods to talk to the employees, in part, because there is often down-time in the mornings prior to going on the road. (Tr. 777-779) However, the Employer did not use this means of communication. Despite the Employer's claims, it is simply untrue that it conducted ride-alongs in place of the meetings because of employee complaints. The Employer continued to have meetings once or twice a week, even after instituting the ride-alongs. Therefore, the Employer did not stop the meetings based on the complaints as its argument would suggest[30].

[29] Faumuina testified that some of his ride-alongs lasted about ten hours. (Tr. 383-385)

[30] Furthermore, Prum, Graham, and Wittig all testified that they did ride-alongs very early in the process, likely prior to any complaints. (Tr. 1085-1086, 1516-1518) The Employer's attempt to use the complaints as the reason is exaggerated in an attempt to justify its actions and avoid a second election.

Similarly, the ride-alongs that went for several hours were overkill and not reasonably tailored to meet the communication needs of the Employer. The Employer's witnesses testified that it instituted ride-alongs to give the employees a safe place to ask questions about the postings and to get to know the employees[31]. However, that would only take a short period. The management employees were in the truck with employees for between five to ten hours. (Tr. 383-385) It would only take approximately five (5) minutes or less to ask employees if they had any questions about the posting. Indeed, the Employer's own witnesses testified that they only asked if there were any questions at the very end of the ride-along. (Tr. 1085-1087) Indeed, some of the Employer's witnesses testified that the management officials never even brought up the Union on its own. Furthermore, Chavin Prum testified that Gordon Quarry told him right at the beginning, before even leaving the facility, that he was supporting the Union and did not have any questions nor did he want to talk about the Union. (Tr. 1149) Had the true purpose been to address any questions regarding the posting, Prum would have ended the ride-along right then and they would not have scheduled more with Quarry throughout the campaign. Nevertheless, neither of those occurred, because Quarry still had three (3) more ride-alongs after his ride-along with Prum. (Tr. 412-413) The lengthy ride-alongs were clearly not narrowly tailored to the employer's stated purpose and instead were simply instituted to demonstrate to the employees the level of control and authority the Employer had over the drivers.

2. The Atmosphere Was Tense During the Ride-Alongs.

The Employer will assert that there is no evidence that the tenor of conversation was hostile, confrontational or tense. That may be true. However, the Employer itself introduced evidence that an employee, Norman Panado, seemed so nervous and uncomfortable with a ride-along that it decided not to require his final ride-along. (Tr. 977) Interestingly, this was after he had already had several ride-alongs. (Tr. 1028, 1216) Therefore, they must not have been as comfortable or cozy as the Employer asserts. Furthermore, certain employees believed that the purpose of the ride-along was to discuss the Union or for the Employer to silently send its message to the drivers regarding the Union because the employees broached the subject themselves. Employees would not have offered

[31] The assertion that ride-alongs were introduced to allow management to get to know its employees is simply ridiculous when the vast majority of ride-alongs were conducted by managers at other facilities that had no previous involvement with Stockton or Union City and will have no ongoing involvement with the operations in Stockton or Union City.

the statements to the management official in the manner they did if they were not anxious and apprehensive about the conversation. While this is not the strongest factor in favor of coercion, there is sufficient evidence to show that the tenor was not purely comfortable, and that the rest of the factors clearly favor the Union's position that the ride-alongs were coercive.

3. The Employees Were Not Allowed to Effectively Decline Ride-Alongs.

The third factor is whether or not employees were effectively allowed to decline ride-alongs. The evidence consistently shows that they were not allowed to effectively decline the ride-along. Tolopa-Joe (TJ) Faumuina testified that the Employer did not ask to do a ride-along but told him they were doing one and that they never gave him the opportunity to decline or make a request for no more ride-alongs. (Tr. 318) Gordon Quarry similarly testified that the Employer never gave him the opportunity to decline a ride-along and that he did not believe that he could have refused. (Tr. 413) Chavin Prum, the Employer's General Manager in Union City, himself testified that he did not ask employees if it was ok to do a ride-along but simply told them that there would be a ride-along.

The Employer will assert that it simply asked employees if it was ok if they went on a ride-along and that it would have been fine if an employee said no. However, not a single employee affirmatively declined ride-alongs, which indicates that in fact there was not an effective way to decline the ride-along. Indeed, Gordon Quarry clearly had no interest in a ride-along or in discussing the Union, yet he still had to endure four (4) ride-alongs because he did not have any option to decline. The Employer will also argue that it cancelled a ride-along for Norman Panado, a Union supporter, because it was clear from Norman Panado's body language that he was not comfortable with another ride-along. However, importantly, the Employer's witnesses testified that he did not decline the ride-along or ask if they could skip him. Instead, the Employer decided itself not to do the ride-along. If there was an effective means to decline the ride-along Panado would have used it and asked to decline, but he did not. Also, this is just one driver out of close to thirty (30) in the entire bargaining unit, and not a single other driver declined the ride-along, implying that there was not an effective means to decline.

4. The Frequency of Ride-Alongs Was Much Greater During The Campaign Than Normal

The fourth factor is a comparison of the frequency of ride-alongs during the campaign to before the Union petition. In fact, in *Frito-Lay* , in finding that the ride-alongs were not coercive, the Board relied on the fact that ride-alongs were not uncommon prior to the campaign. Id. at p.4 In the instant case, however, there is simply no question that the frequency of ride-alongs by management multiplied during the critical election period compared to the time period prior to the Union's petition, and that there were excessive ride-alongs for certain employees.

In Stockton, Randi Graham, the Employer's General Manager, testified that in the four (4) years that she had been General Manager or Site Manager, that management had done less than five ride-alongs total. (Tr. 1565-1567) In fact, she had only conducted a single ride-along in that timeframe prior to the Union petition. (Tr. 1565) Furthermore, Terrell Ellis, who had been a driver in Stockton for ten (10) years, said that he had done one ride-along five (5) years ago and knew of only a handful of other ride-alongs prior to the Union petition, but typically they were only for training purposes and with non-management personnel. (Tr. 181, 184) Kevin Gritsch, a driver presented as a witness by the Employer, testified that he had been a driver for three (3) years and that prior to the Union petition he had never had a ride-along and had never seen management conduct any ride-along, except for initial training. (Tr. 1596-1598) However, during the critical election period, he had two ride-alongs and another Stockton driver, Eric, had three or four ride-alongs. (Tr. 1588, 1596-1600) Graham testified that, during the critical election period, there were fifteen drivers in Stockton and that they had, on average, two to three ride-alongs each. (Tr. 1567) Therefore, while there were less than five (5) management ride-alongs between 2011 and October 2014, and most drivers had not had a single ride-along, there were approximately thirty (30) to forty-five (45) management ride-alongs in the four (4) months after the Union petition and prior to the election[32]. The frequency of the ride-alongs in Stockton certainly increased exponentially.

In Union City, the frequency of ride-alongs also increased greatly. Faumuina testified that he had one ride-along prior to the Union petition, but that it was for a special purpose to consider how

[32] The fact that the Employer has not conducted any ride-alongs since the election is also a telling indication of the Employer's purpose.

his specific route was going. (Tr. 315) Furthermore, Eric Stevens, who was a driver for five (5) years, three of those in Union City, testified that he had never heard of managers doing ride-alongs prior to the Union petition. However, during the time between the Union petition and the election, the Employer instituted several ride-alongs and many drivers had between three to four each. In fact, Faumuina testified that he had seven (7) or eight (8) ride-alongs during this five (5) month period, and Gordon Quarry testified that he had four (4). Simply, the frequency of ride-alongs increased tremendously after the Union petition was filed. This factor certainly favors the Union's position that the ride-alongs were coercive.

5. The Ride-Along Guests Were High Level Managers Who Had No Operational Purpose for Performing a Ride-Along.

Another factor is the positions held by the ride-along guests. In *Frito-Lay,* the Board held that the ride-alongs were not coercive, in part, because many of the ride-alongs were conducted by other employees, albeit non-union employees, and not management. *See Id.* That is not the case here.

In this instance, all of the ride-alongs during the critical period between the petition and the election were done by management level employees. Randy Wittig, the Vice-President of the Western Region did two ride-alongs. (Tr. 972-973) Randi Graham and Chavin Prum, the respective General Managers in Stockton and Union City, did three to four some ride-alongs each. (Tr. 972-973, 1516-1517) The bulk of the other ride-alongs involved general managers from other facilities, and a regional environmental manager[33]. These were all management level employees, most of who had never even been to the respective facilities before. The fact that management employees, including unknown management employees, were forced to ride with the drivers is inherently coercive in itself because of the control and power management has over the employees. This is particularly true given that the Employer had never previously conducted ride-alongs on such a systemic level previously.

In addition, the fact that the vast majority of the management officials performing the ride-alongs were from other facilities and had no particular familiarity or responsibility related to the

[33] The management employees from other areas that conducted ride-alongs were: Carol Romero (Ontario General Manager), Henry Salazar (Phoenix General Manager), Randall McDaniels (Fresno General Manager), Don Harrison (Outside Sales Representative), and Joe Field (Environmental Compliance). (Tr. 972-973, 1019-1023, 1569-1571)

Stockton or Union City operations or personnel is even more persuasive evidence of coercion. The Employer's witnesses admitted that Salazar, Romero, McDaniel, and Field did not have any responsibility regarding the routes, the customers, or supervisory responsibility over the drivers. Therefore, any argument by management that ride-alongs were intended for management to get to know their drivers better or to become more familiar with the routes is simply false. There was no operational reason for these management employees to conduct the ride-alongs beyond demonstrating their authority over the drivers. Indeed, according to Gritsch, the Employer's own witness, once the election was over there have been no more ride-alongs and the management employees that did the ride-alongs are no longer at the facility. (Tr. 1601)

In sum, the identity of the ride-along observers clearly shows that the ride-alongs were inherently coercive because they were all management level, and the majority had no operational reason to do a ride-along other than to demonstrate authority over the employees in the midst of a union campaign.

6. The Ride-Alongs Were Scheduled in a Discriminatory Manner.

Another factor is whether the ride-alongs were scheduled in a discriminatory manner. In this case, it is clear that those employees who were known to be pro-union supporters received far more ride-alongs than those who were not pro-union supporters. The evidence on this issue specifically relates to Union City.

Faumuina testified that it was known that he was a union supporter because he indicated to management employees during the critical period that he thought that the Union would be good for the employees. (Tr. 321-327) He testified regarding nine (9) ride-alongs in the period between the filing of the petition and the election. (Tr. 321-327) He also testified that he noticed when other drivers had ride-alongs, and that it was clear to him that drivers that were not pro-union received far fewer ride-alongs. (Tr. 320-321) He also testified that he spoke with Norman Panado, another pro-union employee who also had several ride-alongs[34]. (Tr. 320) Gordon Quarry, another employee

[34] Jerry Elwood, the Employer's witness, testified himself that Panado had several ride-alongs. (Tr.1028)

who openly supported the Union, testified that he also had four (4) ride-alongs, and that that was more than most of the other drivers. (Tr. 410-421) Indeed, Antonio Jaime who worked as a driver until he was promoted to the Dispatcher position only received one (1) ride-along, and that was at the very beginning of the Union campaign. (Tr. 1303-1304) Thus, there is substantial evidence that the pro-union employees received more ride-alongs. Furthermore, there is testimony from other employees that it was clearly perceived that the pro-union employees were targeted for more ride-alongs.

The Employer will argue that it did not schedule ride-alongs based on union sentiments. Indeed, it will point to testimony from Elwood, Prum, and Graham that they scheduled the ride-alongs, and that an employee's union sentiments had no impact on their scheduling decision. However, that testimony is clearly self-serving as the Employer's witnesses had been trained on what was permissible and knew that any admission otherwise would hurt their case. Furthermore, it is clear, as set forth above that pro-union employees were scheduled more ride-alongs, which was perceived by the employees as well.

The fact that pro-union employees were scheduled a greater number of ride-alongs is further evidence that the ride-alongs were coercive and therefore objectionable.

7. <u>The Ride-Alongs Did Not Take Place in a Context Otherwise Free of Objectionable Conduct.</u>

The final factor to consider is whether or not the ride-alongs took place in a context otherwise free of objectionable conduct. That is simply not the case here. The Union filed nineteen (19) objections and seventeen (17) were set for hearing. Instead of being free of objectionable conduct, the context in both facilities was that the workplace was running rampant with objectionable conduct imposed by the Employer, as proved at hearing and argued throughout this brief. The context of the Employer's unlawful conduct, paired with forced ride-alongs with management that had never previously occurred, furthers the Union's position that the ride-alongs were coercive.

8. The Totality of the Factors Proves That the Ride-Alongs Were Coercive

An analysis of the *Frito-Lay* factors demonstrates that the ride-alongs in this case were administered in a coercive manner, and therefore are objectionable. This conduct clearly interfered with employees' free choice because the employees were influenced by the conduct. Faumuina testified that he spoke with drivers, including Santiago, who told him that employees were on the fence regarding the union, but became scared of losing their jobs based on the ride-alongs. (Tr. 336) Faumuina testified specifically regarding a driver named Santiago who told him in December 2014 that the ride-alongs caused him to be fearful of losing his job. (Tr. 336-338) Furthermore, the Employer provided testimony regarding Panado being clearly scared and uncomfortable when being told that he would be forced to have another ride-along. The ride-alongs were imposed on the drivers, which constituted a substantial number of employees in the bargaining unit, and therefore, the coercive nature of the ride-alongs certainly interfered with the employees' free choice. Therefore, this objection alone is sufficient to mandate that the Regional Director set aside the election results and order a second election.

J. The Employer Violated Objection Nos. 9 and 10 and Interfered with Employees' Free Choice By Interrogating and Polling Employees About Their Own as Well as Their Co-Workers' Support for the Union.

The Board has held that interrogations and polling may be unlawful and objectionable based on the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." (*Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985).) The Board will consider such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. (*Norton Audubon Hospital*, 338 NLRB 320, 320-321 (2002).) In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board established the following factors for analyzing whether an interrogation is unlawful:

(1) The background, i.e. is there a history of employer hostility and discrimination?
(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
(3) The identity of the questioner, i.e., how high was he in the company hierarchy?
(4) Place and method of interrogation, e.g. was employee called from work the boss's office? Was there an atmosphere of unnatural formality?
(5) Truthfulness of the reply.

Under the tests set forth by the Board, the Employer engaged in unlawful interrogation with regard to two employees: TJ Faumuina and Morgan Crowl. In both situations, the totality of the circumstances show that the interrogations were coercive and widely disseminated, and therefore had an improper influence on employees' free choice.

1. The Employer Unlawfully Interrogated TJ Faumuina.

TJ Faumuina testified that the Employer's management employees interrogated him regarding his pro-Union sympathies during his ride-alongs. Specifically, he testified that Carol Romero, Bob Alberrico, Chavin Prum, and Don Mathews all questioned him regarding his support of the Union. (Tr. 327-335) He testified that they all asked him what he thought about the Union and what he thought the Union would mean for him. In addition, he testified that Prum asked him if he thought that it would be better to give him a chance instead of the Union. (Tr. 333) In each circumstance, Faumuina informed the questioner that he thought the Union would be good for the employees. Furthermore, Faumuina testified that during one of three ride-alongs with Romero, Romero asked him who else supported the Union and who were its biggest supporters. (Tr. 327-329, 332) In that instance, Faumuina was not truthful and told Romero that he did not know.

These interrogations were certainly coercive and therefore unlawful. First, it was clear that the Employer was hostile towards the Union based on the daily meetings it had with drivers to attack the Union. In addition, the Employer moved certain pro-Union employees from driving to warehouse

positions. Second, particularly concerning Romero's question, the Employer tried to get information about, and was likely to take some action against, employees who were pushing for the Union[35].

In every instance, those who interrogated Faumuina on ride-alongs were upper level managers, generally at the General Manager level, and included his own manager, Prum. Furthermore, they were all managers who were sent by the corporate office for the specific purpose of doing ride-alongs. Finally, the place of the interrogation was in the company's truck, while they were on the road for several hours, which made it particularly uncomfortable and coercive[36]. Under the Board's stated tests, the interrogations of Faumuina were certainly coercive.

Furthermore, the interrogations had an impact on others in the bargaining unit. Faumuina told other employees that the Employer was interrogating him and were asking him about who else was supporting the Union. Eric Stevens testified that Faumuina told him about the interrogations immediately after he got out of the truck for the ride-along and told him that management asked him about who was supporting the Union[37]. (Tr. 864-865)

The Employer will dispute the truth of Faumuina's testimony and will point to Prum's testimony that he never asked Faumuina questions about the Union but instead that Faumuina expressed his "disdain" for the Union. Prum's testimony is not credible, because if that was the case, Faumuina would not be testifying in a manner that clearly hurts the Employer and is favorable to the Union, particularly given that he still works for the Employer. On the other hand, Prum has every reason not to testify truthfully. Prum was essentially promoted as an Interim General Manager the day after the Union petition was filed. He himself testified that his primary duty when he was first

[35] In *Portola Packaging, Inc.* 361 NLRB No. 147 (2014) the Board set aside the election in part because a supervisor unlawfully interrogated an employee as to whether she knew if another employee was in the Union and asked whether she signed an authorization card. Similarly, in this case, Romero was interrogating Faumuina about other employees' protected activity and who was responsible for pushing the Union.

[36] The Board has held that an interrogation that took place in the CEO's vehicle was coercive and therefore objectionable. See *King Span Insulated Panels*, 359 NLRB No. 19 (2012). Likewise, an interrogation in a company vehicle during a ride-along that could take up to ten (10) hours is certainly coercive and intimidating.

[37] The Employer will argue that Stevens' testimony is hearsay, but as discussed above, this testimony should be admissible based on the "present sense impression" exception to the hearsay rule. Furthermore, the evidence was corroborated by Faumuina's direct testimony.

given the job was to defeat the Union. Therefore, it is believable that he would have done whatever it took to succeed in that manner, including interrogating employees. And it is equally believable that he would not admit to interrogating employees at hearing because he had been informed it was unlawful and would have negative consequences for the Employer. (Tr. 1147-1148) Therefore, Faumuina's testimony is more credible because he has no motive to lie.

In regards to the other management employees, the Employer did not have them testify. Romero, Alberico, and Mathews are all management employees that the Employer certainly would have access to and could have called as witnesses to rebut Faumuina's testimony if it was not true. The Employer did not do so. Therefore, the Union requests that the Hearing Officer conclude that Faumuina's testimony is credible because it was unrebutted by the Employer's own management personnel.

2. Interrogation of Morgan Crowl

The Employer also unlawfully interrogated Morgan Crowl. Crowl was a temp-to-hire employee in the warehouse at the Union City facility. He worked for the Employer from October 27, 2014 until March 18, 2015. (Tr. 463) Crowl was told, when he was hired by Prum and Priscilla Cobb, that they were not hiring any permanent employees while the Union campaign was ongoing but that they would hire temps as soon as the vote was over. (Tr. 471) Crowl testified that in mid-January 2015, Chavin Prum, the Union City General Manager, brought him in to the tech room[38] in the warehouse, shut the door and asked Crowl what he thought about the Union. (Tr. 478) Prum also asked Crowl who else was talking about the Union in the workplace, who originally filed for the Union campaign, and asked Crowl to provide him any information about it that he could. (Tr. 478) Prum also asked Crowl to provide him further information in the future. (Tr. 478-480) Crowl simply told Prum that he was not comfortable doing that and was not at work for that reason, but just to earn a paycheck. (Tr. 480) After Crowl left the tech room, he saw that Prum called in two other

[38] This was labeled as X9 on the diagram of the Union City facility. (Tr. 484-485; Er. Exh. 3)

temporary employees, Ralph and Sam, though Crowl does not know what he talked to them about. (Tr. 480-481)

After the meeting, Crowl immediately went back to the container where the other temps were working, along with three full-time employees, Brandon Marable, Vot Duong and Mike. (Tr. 481-483) The employees asked him why he was pulled into the side room and Crowl told them. (Tr. 483) The employees were surprised that Prum asked these questions and Marable asked for specifics, which Crowl provided. (Tr. 484) Marable corroborated this testimony, and testified that Crowl told him about being interrogated in this manner. (Tr. 717-720)

Again, under the Board's interrogation tests it is clear that the interrogation of Crowl was unlawful and coercive. As discussed above, the Employer certainly was hostile towards the Union throughout the campaign based on its meetings, postings, and overall actions against the Union. The information that Prum sought from Crowl was certainly intended to get information to take action against other employees because he asked for specific information about who filed the petition and started the Union drive. Prum was the General Manager of Union City, the highest-ranking employee at the facility, and the person who had hiring and firing authority over all employees, including Crowl. Furthermore, Crowl was interrogated in the tech room, which would not typically be used for such meetings. The way that Prum brought Crowl, in a manner that everyone else could see, and then shut the door, certainly created an atmosphere of unnatural formality. These circumstances further demonstrate that it reasonably tended to restrain, coerce or interfere with employees' rights.

There was also dissemination to at least three (3) bargaining unit employees immediately after the interrogation. Crowl went and told the employees who he worked with. Thus, these employees knew that Prum was watching and trying to determine who supported the Union. The fact that Prum brought in other employees immediately after Crowl supports the argument that the interrogations were widely disseminated and further contaminated the "laboratory conditions." The interrogation

process was not done secretly, giving employees a reasonable belief that Prum was systematically interrogating temporary employees to learn who was supporting the Union.

The Employer will first argue that this did not occur based on Prum's testimony that he never interrogated employees and that he was trained not to interrogate. However, as discussed above, Prum had motive to take whatever steps he could to help him defeat the Union because he wanted to keep his job as General Manager, and that was his main directive when he was given the job. Furthermore, Crowl's testimony was credible. He testified confidently and competently regarding the facts of what occurred at the warehouse. Furthermore, he no longer works for the Company, so whether the Union ultimately represents the employees has no impact on him because he is no longer working there. Indeed, it would have been easier for Crowl to stay uninvolved, but instead he openly testified to what occurred and his testimony should be credited over Prum as he had no reason to lie.

The Employer will also argue that whether Crowl was interrogated or not is irrelevant because he was a temporary employee who did not get to vote in the election. However, that argument should be given no weight. Whether Crowl had the opportunity to vote or not is immaterial. The fact is that Prum brought Crowl, who was hoping to be hired full-time after the election, into a side office and asked for information about who were the biggest supporters of the Union. This is certainly unlawful interrogation to ask about others' union sentiments. (See *King Span Insulated Panels*, supra.) Furthermore, this interrogation harmed the "laboratory conditions" because Crowl disseminated the information to at least three (3) other bargaining unit employees who, as a result, were likely concerned about any future Union activity because they knew that the Employer was interrogating people and trying to find out who the supporters were. Therefore, the interrogation of Crowl interfered with employees' free choice.

K. The Employer Violated Objection Nos. 12 and 15 and Interfered with Employees' Free Choice By Harassing and Intimidating Employees Based on Union Sympathies and By Telling Employees Not to Speak to pro-Union supporters.

As set forth above, actions that constitute a violation of section 8(a)(1) or that otherwise tend to interfere with employees' free choice in an election is objectionable conduct that can be cause to set aside an election. This includes conduct to harass and intimidate employees based on Union sympathies, or coercing employees to vote against the Union or not associate with pro-Union supporters. In this regard, the Union has presented evidence to prove that the Employer engaged in such conduct, and that that conduct interfered with employees' free choice.

1. The Employer Harassed and Intimidated Ellis During His Breaks and Lunches.

The Employer harassed and intimidated Terrell Ellis during his breaks and lunches. Ellis testified that on a daily basis, management employees, sometimes more than once per break, would come into the break room and ask him if he was on his break or how much longer it would be. (Tr. 158-159) This would occur daily when the Employer clearly knew he was on his break. (Tr. 158-159) Ellis asked Bellido and Graham about this, but they continued to treat him this way. (Tr. 159) This conduct was significant because often other employees would be in the break room and see how they were treating him. (Tr. 156-159) Therefore, it interfered with employees' free choice because other employees saw what could happen and how they would be treated if the Employer knew that they supported the Union.

2. The Employer Kept Employees From Speaking to Ellis.

The Employer also kept employees from speaking to Ellis. Cervantes testified that employees told him that Bellido told employees they should not talk to Ellis because he supported the Union. (Tr. 20) Furthermore, Ellis testified that any time he would talk to employees that management employees, particularly Bellido, would come and direct employees away from him and tell Ellis that he needed to get back to work. (Tr. 150-152, 300-301) Ellis further testified that the Employer did not prevent other employees from talking to other employees during the "critical period" and he often

could hear other employees, including management, engaged in conversation and laughing. (Tr. 300-301) Therefore, Ellis was treated differently, and other employees could readily see the different treatment.

In fact, Ellis testified that employees he had known for years would barely say "hi" to him for fear of being seen as affiliated with him. Some employees even told him that they were not talking to him because they were afraid they may get in trouble because management had told them that they should not affiliate with Ellis. (Tr. 154) Clearly, the Employer's conduct towards Ellis demonstrated to other employees what happens if you support the Union and therefore it interfered with interfered with the election because of the impact it had on all employees, not just Ellis..

3. The Employer, Through Its Agent, Told Two Employees to Discontinue Car-pooling with a Known Union Supporter.

The Employer, through its agent, told Vat Duong to stop carpooling with Brandon Marable because Marable supported the Union. Both Faumuina and Stevens heard Veeble Prum, Chavin Prum's brother, tell Duong not to carpool with Marable. Faumuina testified that he directly heard Veeble Prum tell Duong that it was not a good idea to give Marable, who was one of the most pro-Union employees, a ride to work. (Tr. 348) Stevens also testified that he was present when Veeble, also referred to as Debo, threatened Duong and told him he did not want Duong riding with Marable anymore. (Tr. 872-873) In fact, according to Stevens, Veeble Prum told Duong "Don't forget. I know where you live at." (Tr. 873) This was a threat to an employee not to associate with a pro-Union supporter and was clearly coercive. Given the close voting margin and the vast number of other objectionable conduct, this conduct interfered with employee's free choice.

The Employer will argue that Veeble Prum was just a temporary worker and not an agent of the Employer, and therefore his conduct cannot be attributed to the Employer. However, an Employer under the Act includes an agent who is acting with apparent authority. The Board has held that an employee that engages in an employer's antiunion campaign may give rise to a reasonable

belief that the employee was an agent of management in other unlawful conduct. (*Stations Casinos, Inc.*, (2012) 358 NLRB No. 77 at p. 17.) Thus, when the employer directly supports an antiunion campaign, the employer vests the employee carrying out the campaign with apparent authority to act as the employer's agent and the employee's actions are attributable to the employer. (*Massillon Newspaper, Inc.*, 319 NLRB No. 53 at pp 26-27.)

In this case, Veeble Prum was engaged in the Employer's anti-union campaign. He campaigned against the Union right from the beginning when he was hired by his brother. (Tr. 873) He wore a "vote no" shirt that was supplied by the Employer and worn by management employees. He would regularly go in the warehouse reciting the slogan of the t-shirt, "this guy", and told employees they were stupid if they let the Union in. (Tr. 873) It also is significant that he was a temporary employee hired by his brother, the General Manager, soon after the petition was filed, clearly indicating to the other employees that he was hired to assist his brother carry out the anti-union campaign. For these reasons, Veeble Prum was an agent of the Employer and his objectionable conduct should be attributed to the Employer.

L. The Employer Violated Objection No. 14 and Interfered with Employees' Free Choice By Making Work Assignments In a Manner to Isolate pro-Union Employees From Other Employees and Restrict Their Ability to Discuss Protected Union Activities With Co-Workers.

The Board has held that the isolation of employees in response to union activities is unlawful. (See *Standard Products Co.*, 281 NLRB 141, 142 (1986), enfd. in part 824 F.2d 291 (4th Cir. 1987).) In *Am. Red Cross Missouri-Illinois Blood Servs. Region & Local Union No. 682, Int'l Bhd. of Teamsters.*, 347 NLRB 347, 354-55 (2006), the Board found that the employer isolated three pro-union employees and thereby destroyed the laboratory conditions necessary for a fair election. In that case, the Board held that it was objectionable when the employer changed three union supporters' work schedules shortly after they testified on behalf of the union, and when the other employees

knew about it and could infer that the respondent was discriminating against them because of their union support. (See *Id.)*

In the instant case, the Employer made work assignments and assignments regarding breaks in a manner to isolate pro-union employees. Specifically, it did so regarding Terrell Ellis, Brandon Marable and Eric Stevens.

1. The Employer Isolated Terrell Ellis Through His Work Assignments.

There is no question that Terrell Ellis was a known Union supporter and, as he testified, one of the most vocal union supporters. (Tr. 139-141) Management and other employees certainly knew that Ellis supported the Union. (Tr. 18, 1383, 1469) Ellis had been a driver, but prior to the filing of the petition, he was moved to the warehouse because he had too many points under the Employer's policy. (Tr. 138, 143-144) However, when he was moved to the warehouse he was forced to do work away from other employees and work not typically assigned to permanent employees. Soon after the petition was filed, he was forced to work unloading containers by himself for several hours at a time. (Tr. 144-145) According to both Ellis and Cervantes, no employee was previously assigned to unload containers by themselves. (Tr. 26-27, 145) Instead, the entire Receiving department would stop and work to unload the container prior to Ellis being assigned these duties. (Tr. 27) Ellis testified that the Receiving Lead, Harvey Nelson, told him that no other permanent employee had performed that task alone. (Tr. 202) Ellis requested assistance but Manabe told him no because Graham wanted him to do that job. (Tr. 145-146) In fact, on one occasion, a temporary employee was helping Ellis and Manabe pulled him from the task to do something else that was not urgent, and did not allow the temporary employee to help Ellis after he had finished the other job. (Tr. 145-148) Importantly, the containers were in a far corner of the warehouse away from everyone else. (Tr. 163)

Ellis also testified that he was assigned many other jobs that kept him away from other employees, such as sweeping the yard, dumping garbage, cleaning out the courtyard and pallet yard.

(Tr. 148-149) These duties are not typically performed by permanent employees and would be away from the other warehouse employees. (Tr. 149) He also testified that he was assigned to duties outside of the building that were usually done once or twice a year, but the Employer had him do these tasks more often because they were away form other employees. (Tr. 166) This included dusting files from the years 2012- 2014, stacking them, cleaning the filing cabinets, and shrink wrapping the files. These were duties that had not been done since 2012 and the type of duty typically performed by a temporary employee. (Tr. 166)

Cervantes testified that it was clear to him that Ellis was being isolated from other employees[39]. (Tr. 26-27) Cervantes confirmed that it was well known throughout the facility that Ellis was supporting the Union because he handed out the Union flyers and was a vocal supporter. (Tr. 19) Cervantes testified that Ellis was forced to unload containers, working all day long on 1,500 piece containers, and had to unload it by hand. (Tr. 26) Cervantes saw Ellis doing this work when he would walk to the outside door during his breaks. (Tr. 59-67) Cervantes also testified that the other warehouse employees saw this and knew that he was forced to perform this difficult task by himself because they would see him when they took their breaks at 6:00 a.m. (Tr. 28)

This was all occurring at the same time that the Employer was telling employees not to talk to Ellis and would "shoo" employees away if Ellis was talking to them. (Tr. 150-152) Indeed, Ellis testified that he noticed a clear change in employees not talking to him, and that some employees told him that they were not talking to him because they were scared to affiliate with him because of how the Employer treated him and because management had told them not to affiliate with him. (Tr. 154)

The Employer clearly isolated Ellis in a manner that was open for all warehouse employees to see. That conduct showed discriminatory treatment and kept Ellis from being able to discuss the Union. Such conduct is objectionable and grounds for setting aside the election.

[39] Cervantes also testified that pro-Union employees were isolated from other employees by having separate meeting just for the Union supporting because the Employer did not want other employees to hear their questions. (Tr. 57-58)

The Employer will argue that it did not intend to isolate Ellis, but instead that it was assigning him work that he could do because he would not work on a "cherry picker" and there was not other work for him to do. However, despite the fact that Ellis did not work on the "cherry picker," the Employer could have assigned other employees to help in the containers, as it had always done prior to the petition. Furthermore, driving the "cherry picker" was the only task on the Receiver's job description that he could not do. Ellis went through all of the tasks on the job description that he could perform. (Tr. 203-208; Er. Exh. 2) The Employer will also assert that Ellis was assigned other tasks because they were trying to get him extra hours for not performing well in the UPS job. That is pretext, however, because there is no evidence that Ellis was ever disciplined for not performing well in that task or any other task. Furthermore, Ellis himself testified that nobody ever told him that he was deficient in the job. (Tr. 310-312)

The Employer assigned Ellis to tasks that isolated him, kept him away from other employees, and signaled to other employees that this is what happens if you support the Union.

2. The Employer Isolated Eric Stevens Through His Work and Break Assignments.

Eric Stevens, a pro-Union employee in Union City, was a driver who was moved to the warehouse in October 2014 because of his driving record. (Tr. 818-819) It was well known that Stevens was a key supporter of the Union and, in fact, Prum testified that Stevens told him he supported the Union. (Tr. 824-826, 1252) When Stevens was moved to the warehouse, he was assigned to unload containers all by himself. (Tr. 825-826) He testified that Torres, the Warehouse Manager, told him that the Employer was going to put him in a container by himself to try to make him quit. (Tr. 826) Stevens testified that he was assigned to work in the hot container by himself for about a month and that he knew that nobody else was ever assigned that work by themselves because Torres, the Warehouse Manager, and Tony Jones, a former Warehouse Lead, told him that. (Tr. 868) Crowl testified that when employees are working alone in the container they do not have the ability to have any meaningful interaction with other employees. (Tr. 475)

In addition, Stevens testified that he was assigned breaks separate from all other employees, particularly Brandon Marable. (Tr. 870-872) Prior to the petition, the employees would take break when they decided to and the warehouse employees would often take breaks together. (Tr. 941-942) However, at some point during the "critical period" the Employer began assigning break times to the employees, and those times for breaks and lunches were generally separate. In particular, Stevens was assigned to breaks and lunches all by himself. (Tr. 870-872; Er. Exh. 14) This clearly isolated the employees from being able to speak to each other about union matters.

The Employer will argue that Stevens was assigned to unload the container when he first started because he was not trained or certified to operate a "cherry picker." However, Crowl testified that the Employer typically trains employees for less than a day before they start using the "cherry picker" on their own. (Tr. 539, 586) Therefore, the Employer certainly could have trained Stevens. Furthermore, the fact that he was not certified to use a "cherry picker" has no bearing on whether other employees could be assigned to assist with the container. The Employer still could have had other employees assisting as it typically did.

The Employer will likely argue that it had to set scheduled breaks and lunches because several employees, including Stevens, filed complaints with the Labor Commissioner regarding rest periods and meal periods violations. (Er. Exhs. 12, 13) The employees did file complaints, but the Employer did not need to assign all permanent employees to separate break and lunch times. Previously, the employees all took breaks at the same time. The Employer could have assigned breaks and lunches as a group at a specified time. It did not do so, clearly with the intent of isolating the employees during the time prior to the election.

3. <u>The Employer Isolated Brandon Marable Through His Work and Break Assignments.</u>

Brandon Marable is another pro-Union employee who was isolated in the Union City facility. The Employer knew that Marable was pro-Union because he was very vocal, wore a Union shirt, and explicitly told Prum that he supports the Union. (Tr. 682-684) Marable was a driver, but then was

moved to a warehouse position in January 2015 because the Employer stated that he had too many incidents on his driving record, which he disputed.[40]. (Tr. 678-679) When he was moved to the warehouse, he also was assigned to unload containers all by himself. (Tr. 686-687) He was initially working with someone who trained him, but after a week he was assigned to do that work by himself. (Tr. 687) Marable testified that two temporary workers were always assigned to unload containers, never a single permanent employee by themselves. (Tr. 687-688) Marable testified that when he was assigned to work in the trailer by himself, they kept him in the trailer so he did not have access to talk to anyone. (Tr. 688) Crowl testified that Marable was forced to work in the container by himself for up to four or five hours with no interaction with other employees. (Tr. 475) Crowl testified that prior to Marable he had never seen an employee work on a container by himself, that it was always at least two employees if not three or four. (Tr. 476) Marable was also assigned specific break and lunch times that were separate from all other permanent employees. (Tr. 689; Er. Exh. 14)

For the same reasons as set forth above regarding Stevens, the Employer's treatment of Marable is objectionable, interfered with the election, and is grounds for the election to be set aside and a new election ordered. The Employer will make the same arguments related to Marable as it did for Stevens, and for the same reasons as set forth above, those arguments are without merit.

M. The Employer Violated Objection Nos. 18 and 19 and Interfered with Employees' Free Choice By Unlawfully Engaging in Surveillance and Intimidation Around the Polling Locations.

It is objectionable conduct for an employer to engage in surveillance or intimidation around the polling locations during the voting periods. "The Board has long held that, where supervisors exercise surveillance over employees while they are in the process of voting, either by watching them stand in line, standing in a spot where employees must pass in order to go to the polls, or walking up and down a line of waiting voters and engaging in chitchat, such conduct upsets the laboratory

[40] It is interesting that the most vocal pro-Union drivers all had their driving records randomly checked during the "critical period" and were all removed from driving and moved to the warehouse.

conditions which the Board is obligated to maintain in the election process. It will result in the setting aside of the election." (*Sav-Mor Centers, Inc.*, 234 NLRB 775, 779 (1978) citing *Performance Measurements Co., Inc.*, 148 NLRB 1657 (1964); *Milchem, Inc.*, 170 NLRB 362 (1968).) "It has been long established that the stationing in the polling area of a supervisor conveys to employees that their union activities are being observed and that such conduct destroys the laboratory conditions necessary for a free election." (*Premier Maint.*, 282 NLRB 10, 19-20 (1986) citing *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982).)

In the instant case, the Employer's management officials in Union City stood in areas that employees had to walk by to get to the voting location, giving the impression of surveillance and intimidating employees. Faumuina testified that he was working in the loading areas during the 6:00 a.m. voting period and saw Prum and Elwood standing in the break room for approximately fifteen to thirty minutes during the first voting period. They were wearing their "vote no" shirts[41]. (Tr. 352) Faumuina testified that there is a window in the break room so they could see who was walking to vote and employees could see them. (Tr. 352) Importantly, Faumuina also testified that Prum and Elwood were never in the break room for an extended period like that. (Tr. 352)

Crowl testified that he was working during the 9:30 a.m. voting period and was getting started with his shift and then on a cherry picker ,but was up front in the loading area quite a bit. (Tr. 514-515) He testified that he saw Prum, Elwood, and Brown all standing, at different times, in front of the break room and in front of the office areas, designated as X7a and X10. They were just standing there[42]. (Tr. 515) Crowl testified that he noticed this because management employees never were standing in that area. They typically would be in their office. (Tr. 514) He also testified that

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[41] Faumuina marked on the diagram of the facility that Prum and Elwood were standing at X1 in the morning. (Tr. 368; Er. Exh. 3) The employees voted in the IT room that is designated as X2. (Tr. 369; Er. Exh. 3) The majority of employees would walk in through the front entrance, which is X4. (Tr. 371; Er. Exh. 3) From X4 to X2 the employee would have to walk right by the break room where Prum and Elwood were hanging out. Faumuina was working in the area marked X5, which has a clear line of sight into the break room. (Tr. 372-374; Er. Exh. 3)

[42] Crowl testified that he saw different management employees at different times, each for around ten or fifteen minutes. (Tr. 515, 518-519)

employees were generally coming from the X5 area to vote and would have to walk right by where the management employees were standing. (Tr. 518-520,; Er. Exh. 3) Crowl testified that he was either in the staging area, at X5, or on a picker during this time but would be back up front every two (2) minutes or so, and could see through the aisles where he saw the management employees. (Tr. 610-619, 627-629) Crowl also testified that the management employees were saying hello to the other employees, which was unusual. (Tr. 618-619)

Finally, Stevens testified that he saw Prum, Elwood and Brown, at different times, standing right around A1 and A2 in the diagram. This was near the edge of the aisles at the corner where employees had to walk by to go vote. (Tr. 881-882; Er. Exh. 3) Stevens testified that most of the employees were coming from X5 area, coming off their routes to vote, and that they would have to walk right by the management employees to get to the IT room. (Tr. 883-884) Stevens testified that three employees, Josh, Christian, and Vat, told him that management was standing right by where they had to vote and they felt intimidated. (Tr. 885)

From this testimony, it is unquestionable that the Employer's management officials stood in areas that were visible to employees and where employees had to walk by in order to vote. This is objectionable conduct because of its tendency to interfere with free choice, and therefore, is cause for the election results to be set aside.

The Employer disputes this testimony, and instead will argue that Elwood and Prum were in the conference room during the voting times. However, the testimony of the Employer's own witnesses does not support this argument. Prum admitted to being in the break room during the 6:00 a.m. voting period to get coffee. (Tr. 1222) Elwood and Prum both testified that during the voting periods they were always in the conference room. However, Elwood testified that Prum was not always in the conference room and that he believed Prum was at his desk for portions of the voting, but that he could not see him. (Tr.1030) This is contrary to Prum who testified he was in the conference the entire polling periods. Interestingly, the Employer did not solicit any testimony regarding where

Brown was during the voting periods. Therefore, it did not rebut the testimony that he was standing in areas where employees had to walk in order to vote. In fact, Elwood testified that he was no in the conference room and he does not know where Brown was during the polling periods. (Tr. 1030) Furthermore, the Employer called Christian Garcia, and did not ask him about whether the managers' presence near the voting site intimidated him, despite the fact that Stevens had already testified to this, thereby drawing an inference that Garcia would not have rebutted Stevens' testimony.

Furthermore, the Employer's witnesses were biased because they testified that they were instructed about what permissible conduct was during the voting times. Therefore, they knew that there would be negative consequences for the Employer if they admitted to being stationed where employees had to walk to vote. The Union employees, particularly Crowl, have no reason to lie, and indeed, testifying against their employer is not within their best interests. For these reasons, the Union's witnesses' testimony should be given greater credibility. The Employer's conduct during the election, by giving the impression of surveillance and intimidating voters in the areas where employees had to walk to get to the polling locations, is objectionable and another ground for setting aside the election and ordering a new election.

IV. CONCLUSION

For the foregoing reasons, the Board should find that Keystone interfered with the election and uphold the Union's objections. As a remedy, the Board should set aside the election results and direct a new election. To reestablish the proper laboratory conditions, Keystone should be required to post a *Lufkin* notice in the workplace explaining to the unit employees why the original election was set aside. (*Lufkin Rule Co.*, 147 NLRB 341 (1964).)

Dated: June 22, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I declare that I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 520 Capitol Mall, Suite 300, Sacramento, CA 95814. On this day, I served the foregoing Document(s):

Petitioner's Post-Hearing Brief in Support of Its Objections

☐ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Mike Carrouth
Fisher & Phillips LLP
1320 Main Street, Suite 750
Columbia, South Carolina 29201

Email: mcarrouth@laborlawyers.com

I declare under penalty of perjury that the foregoing is true and correct. Executed in Sacramento, California, on this date, June 22, 2015.

Cynthia Belcher
BEESON, TAYER & BODINE, APC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I declare that I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) years and not a party to this action. My business address is 520 Capitol Mall, Suite 300, California, 95814. On October 6, 2015, I served the following document(s):

UNION'S OPPOSITION BRIEF TO RESPONDENT'S EXCEPTIONS TO HEARING OFFICERS REPORT AND RECOMMENDATIONS ON OBJECTIONS

☐ **By Mail** to the parties in this action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Sacramento, California.

☐ **By Personal Delivery** to the parties in this action, as addressed below, of a true and correct copy thereof in accordance with Code of Civil Procedure §1011.

☐ **By Messenger Service** to the parties in this action, as addressed below, by placing a true and correct copy thereof in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service in accordance with Code of Civil Procedure § 1011.

☐ **By Overnight Delivery** to the parties in this action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in an area designated for outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business, for delivery the following day via United Parcel Service Overnight Delivery.

☐ **By Facsimile Transmission** to the parties in this action, as addressed below, a true and correct copy thereof in accordance with Code of Civil Procedure §1013(e).

☒ **By Electronic Service** to the parties in this action, at the electronic notification address(es) below. Based on a court order or an agreement, the parties have agreed to accept service by electronic transmission in accordance with Code of Civil Procedure § 1010.6. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Reyburn Lominack III, Esq.
Email: rlominack@laborlawyers.com

George Velastegui
Regional Director
NLRB, Region 32
george.velastegui@nlrb.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed in Sacramento, California, on October 6, 2015.

Cynthia Belcher